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ABRIDGED EDITION

SASTRI GOLAP & HANDRA SARKAR'S

HINDU LAW

[FOR STUDENTS AND BEGINNERS]

THIRD EDITION

BY

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WITH A FOREWARD

BY

The Hon'ble Justice Sir Manmatha Nath Mukerji, Kt.

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FOREWORD

BY

The Hon'ble Justice Sir Manmatha Nath Mukerji, Kt.

The absence of an abridged edition of Sastri Golap Chandra Sarkar's Hindu Law has always been keenly felt. The original treatise by reason of its masterly treatment and its clear enunciation and learned exposition of Hindu Law such as it is according to the several schools, and its discerning criticisms of judicial decisions bearing on it, is justly regarded as a piece of legal literature of high intrinsic value and authority. To beginners in the study of this branch of the law and to the general student, however, such learned discourses as there are in the original treatise are not easy of comprehension or assimilation. For them a book which follows closely on the lines of the original treatise but contains a more concise and less elaborate presentation of the subject and yet deals with it in a fairly comprehensive and compendious form is undoubtedly more suitable. The author of this abridged edition, therefore, is to be congratulated for having endeavoured to supply what may rightly be said to be a long felt desideratum.

The task was by no means simple or easy. To retain the distinctive feature of the original treatise, to re-state its contents within a smaller compass, but quite accurately and with equal perspicuity, is a piece of work for which not merely a thorough knowledge of the law is essential but the work itself requires no inconsiderable proficiency in an art of a special nature.

The author of this abridged edition, I venture to think, has done his part well. He was peculiarly well-equipped

for the purpose: he had the privilege of sitting at the feet of his revered father, the author of the original treatise ; his own knowledge and experience on this branch of the law are recognised in all quarters and are widely availed of ; and he has had to edit several of the more recent editions of the original treatise and he has done that work in a manner which has in no way impaired its worth.

The real merit of a text book on law lies in the certainty of the voice in which it speaks. The value of the statements of law that it contains depends upon the sources from which the statements are derived and the accuracy with which they are reproduced. Both these characteristics are a special feature of this abridged edition.

Some of the other special features of this book which are worth mentioning are: The different topics are carefully arranged under different headings and sub-headings and with profuse cross-references ; differences amongst the several schools and divergence of judicial opinion have been formulated with precision ; decisions of the Judicial Committee, and the latest decision, if there is any, of each Indian Court, on every point, are given in the foot-notes ; and a topic has been incorporated on Mimansa Rules of Interpretation,—a subject of which some rudimentary knowledge is absolutely essential for all students of Hindu law. And to help the reader in his study of the subject, leading cases have been prominently printed in the Table of Cases.

CALCUTTA:

29th April, 1935.



M. N. Mukerji.

PREFACE

This edition had to be thoroughly revised in order to indicate at proper places in this book, the wide effect of the Hindu Women's Rights to Property Act. The Act, though apparently a very short enactment, has more or less affected various topics of Hindu law.

To make the book useful to both lawyers and students of every part of the country, the difference of opinion of the various highest Courts of Appeal in India are pointedly indicated supported by case-law, the Privy Council decisions are profusely referred to and at the end of the book notes on 52 leading cases are incorporated so that one can, in a moment, refresh his memory about any important decision.

I express my thanks to Mr. Amal Kumar Mukerji, M.A., B.L., Advocate for kindly examining the proofs.

20B, SANKARITOLA STREET,
Calcutta, the 22nd August,
1940.

{ R. N. SARKAR.

CONTENTS

	PAGES.
CHAPTER I—Introductory ...	1— 22
SECTION 1—Origin and Sources of law ...	1— 13
Sub-Section i—Dharma Shastras ...	1— 3
ii—Customs ...	3— 7
iii—Commentaries ...	7— 10
iv—Interpretation of texts ...	10— 12
v—Case-law ...	12— 13
SECTION 2—Schools of Hindu law ...	13— 16
3—Hindu law and its application ...	16— 22
Sub-Section i—Persons governed by it ...	16— 18
ii—Religion and Conversion	18— 19
iii—Migration and Schools of law ...	19— 20
iv—Hindu law, now in force	20— 22
CHAPTER II, A—Definitions ...	23— 36
SECTION 1—General terms ...	23— 25
2—Relationship ...	25— 32
Sub-Section i—Sapinda ...	25— 30
ii—Sakulya ...	31
iii—Samanodaka ...	31— 32
iv—Bandhus ...	32— 33
B—Rules of Interpretation ...	33— 36
CHAPTER III—Marriage ...	36— 60
SECTION 1—General Discussion ...	36— 40
Sub-Section i—Institution of marriage ...	36— 37
ii—Forms of marriage ...	37— 39
iii—Parties and marriageable age ...	39— 40
SECTION 2—Prohibited Relationship ...	40— 44

	PAGES.
SECTION 3—Intermarriage	44— 47
Sub-Section i—Castes	44— 45
ii—Inter-Caste marriage ...	45— 47
SECTION 4—Liability and Guardianship for marriage	47— 50
Sub-Section i—Expenses of marriage ...	47— 48
ii—Guardianship for marriage	48— 50
SECTION 5—Ceremonies	50— 51
6—Gharjamai, Ghardamad ...	51— 52
7—Legal Consequences ...	52— 54
8—Judicial Proceedings ...	54— 57
9—Re-marriage ...	57— 58
10—Polygamy and Polyandry ...	58— 59
11—Divorce ...	59— 60
CHAPTER IV—Adoption	60— 93
SECTION 1—General Topics	60— 63
Sub-Section i—Sons and spiritual benefit	60— 61
ii—Law of adoption ...	61— 62
iii—Form of adoption ...	62— 63
SECTION 2—Who may Adopt	63— 72
Sub-Section i—Capacity of men ...	63— 65
ii—Capacity of women ...	65— 70
iii—Kinsmen's assent ...	70— 72
SECTION 3—Who may give in Adoption ...	72— 73
4—Who may be given and taken in	73— 76
Sub-Section i—Quality of sons to be taken	73— 74
ii—Prohibited relation ...	74— 75
iii—Caste of the boy ...	75
iv—Age and initiatory ceremonies	75— 76
SECTION 5—Necessary Ceremonies ...	77— 78
6—Status and Rights ...	78— 88
Sub-Section i—Status after adoption ...	78— 80
ii—Status in adoptive family	80— 81

	PAGES.
Sub-Section iii—Adoptive mother ...	81— 82
iv—Ante-adoption agreement ...	82— 84
v—Share of adopted son ...	84— 85
vi—Adoptee's rights against adopter	85
vii—Adoption by widow and divesting	86— 87
viii—Unauthorized alienation by widow	87
ix—Invalid adoption	87— 88
SECTION 7—Judicial Proceedings ...	88— 89
8—Dvyamushyayana Adoption ...	90
9—Kritrima Adoption ...	90— 92
10—Adoption of Daughters ...	92
11—Illatom son-in-law ...	92— 93
CHAPTER—V—Mitakshara Joint Family ...	93—163
SECTION 1—General Topics ...	93— 95
2—Members of Family ...	95— 98
Sub-Section i—Males, females and de- pendants ...	95— 97
ii—Conversion to different faith	97— 98
SECTION 3—Property of Family ...	98—106
Sub-Section i—Unobstructed & obstruc- ted heritage ...	98
ii—Joint and separate ...	98—101
iii—Ancestral and acquired ...	101—103
iv—Immovable, corody, mov- able	103—104
v—Trade	104—106
SECTION 4—Rights of members ...	106—111
Sub-Section i—Right by birth and ownership ...	106—108

	PAGES.
Sub-Section ii—Posthumous and adopted son ...	108—109
iii—Son's rights ...	109
iv—Woman's rights ...	109—110
v—Enjoyment of property	110—111
vi—Vesting and divesting	111
SECTION 5—Management of Family ...	111—122
Sub-Section i—Manager ...	111—113
ii—Alienation by Managers	113—114
iii—Legal necessity and benefit	114—115
iv—Creditors and alienees ...	115—117
v—Family Account ...	118
vi—Guardians and minors ...	118—122
SECTION 6—Alienation ...	122—127
Sub-Section i—Alienation of property ...	122
ii—Alienation of undivided interest ...	123—125
iii—Gift ...	125
iv—Will ...	126
v—Setting aside alienation	126—127
SECTION 7—Debts ...	127—137
Sub-Section i—Debts contracted by manager ...	127
ii—Personal debt of member	127
iii—Liability of heirs for debts	128
iv—Father's debts ...	128—134
v—Mother's debts ...	134
vi—G. father's GG.—father's debts	134
vii—Debts not binding on heirs	134—136
viii—Interest ...	136—137
ix—Limitation ...	137
SECTION 8—Judicial Proceedings ...	137—143
Sub-Section i—Suits ...	137—141

	PAGES.
Sub-Section ii—Burden of proof ...	141—142
iii—Limitation ...	142—143
SECTION 9—Devolution of member's interest 143—147	
10—Partition	147—160
Sub-Section i—Partition of joint property 147—148	
ii—What constitutes severance 148—151	
iii—Account of joint estate ... 151	
iv—Shares 151—156	
v—Incomplete and partial partition 156—157	
vi—Re-opening partition ... 158	
vii—Limitation ... 159—160	
SECTION 11—Impartible Property 160	
12—Evidence and Presumption ... 160—163	
Sub-Section i—Evidence 160	
ii—Presumption ... 160—163	
CHAPTER VI—Mitakshara Succession ... 163—175	
SECTION 1—Succession of Males ... 163—174	
Sub-Section i—Principles of succession 163—166	
ii—Order among Sapindas ... 166—171	
iii—Order among Samanodakas 171—172	
iv—Order among Bandhus 172—174	
v—Order among other heirs 174	
SECTION 2—Female heirs 174—175	
CHAPTER VII—Re-union Under Both Schools 175—178	
SECTION 1—Reunion under Mitakshara ... 175—177	
Sub-Section i—General discussion ... 175—177	
ii—Order of succession ... 177	
SECTION 2—Re-union under Dayabhaga ... 177—178	
CHAPTER VIII—Dayabhaga Joint Family ... 178—183	
SECTION 1—Mitakshara and Dayabhaga ... 178—180	
2—Nature of Joint Family ... 180—181	

	PAGES.
SECTION 3—Partition ...	181—183
4—Adversee possession ...	183
CHAPTER IX—Dayabhaga Succession ...	183—189
SECTION 1—General Rules of Succession ...	183—184
2—Order of Succession ...	185—187
3—Mitakshara & Dayabhaga ...	188—189
CHAPTER X—Exclusion from Inheritance & Divesting ...	189—195
SECTION 1—Causes of exclusion ...	189—194
Sub-Section i—Moral and religious defects ...	190—192
ii—Mental defects ...	193
iii—Physical defects ...	193—194
SECTION 2—Effects of disqualification ...	194—195
3—Evidence ...	195
CHAPTER XI—Maintenance ...	195—204
SECTION 1—Liability for Maintenance ...	195—196
2—Who entitled to maintenance ...	196—201
Sub-Section i—Son, daughter-in-law etc. ...	197—198
ii—Wife or widow ...	198—199
iii—Step-mother ...	199—200
iv—Daughters and Ghar-jamais ...	200
v—Sister ...	200
vi—Dependent members ...	200—201
vii—Concubine and illegitimate issue ...	201
viii—Junior member of immoveable estate ...	201
SECTION 3—Legal Incidents ...	201—204
Sub-Section i—Amount of maintenance ...	201—203
ii—Charge on property ...	203
iii—Transfer of maintenance	203—204

PAGES.

Sub-Section iv—Limitation	204
CHAPTER XII—Female Heirs and Stridhanam	204—233
SECTION 1—General observation ...	204—207
Sub-Section i—Women's rights ...	204
ii—Woman's rights under Codes	204—206
iii—Her right under Commentaries ...	206—207
SECTION 2—Stridhana ...	207—209
Sub-Section i—Case law on Stridhana ...	207—208
ii—Stridhana inherited by women	208
iii—Property received by partition	209
SECTION 3—Widow's Estate ...	209—214
Sub-Section i—Nature of widow's estate	209—211
ii—Compromise and settlement	211—212
iii—Termination of widow's estate	212—213
iv—Co-sharers of widows ...	213—214
SECTION 4—Alienation of Widow's estate ...	214—221
Sub-Section i—Charge on widow's estate	214—215
ii—Alienation of widow's estate	215
iii—Legal necessity	216—218
iv—Transferee's duty ...	218—219
v—Purdanashin lady ...	219—220
vi—Alienation without necessity	220
vii—Court's sanction for alienation	220—221
SECTION 5—Accumulation and Acquisition	221—222
6—Waste	222
7—Judicial Proceedings ...	222—224

	PAGES.
SECTION 8—Partition with husband's co-parceners	225
9—Reversioners	... 225—233
Sub-Section i—Right of reversioners	... 225—226
ii—Surrender	... 226—228
iii—Sale or gift to reversioner	228
iv—Alienation, reversioner's consent	... 228—230
v—Suits by reversioners	... 230—232
vi—Deceased widow's debts etc.	232—233
CHAPTER XIII—Succession to Stridhanam	233—239
SECTION 1—Maiden's property, both Schools	233—234
2—Mitakshara	... 234—236
3—Mithila, Maharastra and Dravira	236
4—Sulka	... 237
5—Dayabhaga succession	... 237—238
6—Fallen woman's heirs	... 238—239
CHAPTER XIV—Holy Orders and Endowment	239—262
SECTION 1—Persons of Holy Orders	... 239—241
2—Endowment	... 241—243
3—Images	... 243—244
Sub-Section i—Juridical persons	... 244
SECTION 4—Mutts and Satras	... 244—245
Sub-Section i—Mutts	... 244—245
ii—Satras	... 245
SECTION 5—Mahunits	... 245—246
6—Endowed Property	... 247—250
Sub-Section i—Nature of property	... 247—248
ii—God and Mutt owner	... 249
iii—Family deity	... 249—250
SECTION 7—Management	... 250—251
8—Debts and Alienation	... 251—254
Sub-Section i—Debts	... 251—252

	PAGES.
Sub-Section ii—Alienation of property ...	252—253
iii—Alienation of sebayet's rights	253—254
iv—Alienation of office ...	254
SECTION 9—Judicial Proceeding ...	254—259
Sub-Section i—Suits relating to endow- ments	254—255
ii—Removal of managers ...	255—256
iii—Suits for account ...	256
iv—Probate and Letters of Administration ...	256
v—Suits relating to certain rights	257
vi—Parties to suits ...	257
vii—Res Judicata ...	257—258
viii—Adverse possession ...	258
ix—Limitation ...	258—259
SECTION 10—Succession ...	259—262
Sub-Section i—Succession to Matts ...	259—260
ii—Succession to private endowments ...	260—261
iii—Acceleration of succession	261
SECTION II—Partition ...	262
CHAPTER XV—Impartible Estates ...	262—269
SECTION I—History of Impartible Estates ...	262—263
2—Evidence of imparibility ...	263—264
3—Holder's rights ...	264—266
4—Maintenance to Junior members	266—267
5—Succession ...	268—269
6—Adverse Possession ...	269
CHAPTER XVI—Alienations and Wills ...	269—280
SECTION I—Alienations ...	269—272

	PAGES.
Sub-Section i—Property	269—270
ii—Power of alienation ...	270—272
iii—Pre-emption ...	272
SECTION 2—Gifts	272—277
Sub-Section i—Definition and requisites	·
of gift	272—273
ii—Conditional gift and <i>donatio mortis causa</i> ...	273—274
iii—Gifts to women ...	274—275
iv—Existence of donee ...	275
v—Rules of perpetuity and remoteness	276—277
vi—Priority among transferees	277
vii—Universal donee ...	277
SECTION 3—Wills	277—280
Sub-Section i—How applied to Hindus	277—278
ii—Testamentary powers ...	278
iii—Construction of Wills ...	278—280
Leading Cases	281—317
Abbreviations	319—320

ERRATA

Page 213, line 3 for "Co-shares" read "Co-sharers"
 .. 261, line 20 for "Sub-Sec. ii" read "Sub-Sec. iii"

HINDU LAW

CHAPTER 1 INTRODUCTORY

Sec. 1—ORIGIN AND SOURCES OF LAW

Sub-Sec. I—Dharma Shastras

Divine origin of laws.—The Hindus believe their law to be of divine origin, and they believe this, not only of what Austin calls the laws of God, but positive law also is believed by them to have emanated from the Deity. The idea of Sovereign in the modern judicial sense was unknown to them. By this original theory of its origin, the law was independent of the state, or rather the state was dependent on law, as the king was to be guided in all matters connected with government by the revealed law, though he was not excluded from a control over the administration of justice.

The earlier notion of law was gradually modified to a certain extent, as may be gleaned from the remarks of the commentators. And the conception of positive as distinguished from divine law, presented to us by the commentators, nearly approaches the ideas of modern jurisprudence.

The sources of law.—The term 'source of law' is used in two senses: in one, the Deity according to the Hindus, and the Sovereign according to modern jurisprudence, is the fountain source of law; and in the other sense, the term means that to which one must resort to get at law. In this sense, the sources of Hindu law are the *Sruti*, the *Smriti*, *Purana* and the *Immemorial and approved Customs*, by which the Divine will or law is evidenced.

Sruti.—The Sruti is believed to contain the very words of the Deity. The name is derived from the root *sru* to hear, and signifies what was heard. The Sruti contains very little of lawyer's law. The Sruti comprises of the *four Vedas*, the *six Vedangas*, and the *Upanishads*.

The Vedas are *Rik*, *Yajur*, *Saman* and *Atharvan*. The *Rik-Veda* praises either a God, or a thing or the instrumentality of a thing for pleasing the Gods. The *Yajur-Veda* relates chiefly to sacrifices. The *Sama-Veda* consists of prayers composed in metre and intended to be chanted at sacrifices. The *Atharva-Veda* contains hymns, incantations and forms of imprecations for destroying or injuring enemies, and prayers for safety from enemies or for averting calamities.

The *Vedangas* or appendages to the Vedas came into existence in the post-Vedic period. These are six in number and not regarded as sources of law.

The *Upanishads* are denominated as the *Vedanta* or the concluding portion of the Veda and embody the highest principles of Hindu religion.

Smriti.—The Smriti means what was remembered, and is believed to contain the precepts of God, but not in the language they had been delivered. The language is of human origin, but the rules are divine. The Smritis are the principal sources of lawyer's law, but they also contain matters other than positive law. The complete Codes of Manu and Yajnavalkya deal with religious rites, positive law, penance, true knowledge and liberation. There are some that deal with positive law alone, such as the Code of Narada, now extant. Many others contain nothing of civil law.

Dharma, Law and Sources.—The word *dharma* is generally rendered into Law and includes all kinds of rules: religious, moral, legal, physical, metaphysical or scientific, in the same way as the term Law does, in its widest sense.

By the term *dharma* is understood the rules whereby not only mankind but all beings are governed. The *Sruti* and the *Smriti* are comprehended by the term *Dharma-shastra* in its primary sense, inasmuch as, the objects of both are to teach of rules or duties. But the word *Dharma-shastra* is often used to designate the *Smritis* alone with a view to mark their practical importance.

Puranas. —The *Puranas* also are considered by the later commentators as a source of law. They are voluminous mythological poems professing to give an account of the creation, to narrate the genealogy of Gods, of ancient dynasties and of sacerdotal families, to describe the different ages of the world and to delineate stories of gods, ancient kings and sages ; and in doing so they also relate religious rites and duties. *The Puranas are not considered authoritative so as to override the Smritis*, but are deemed to illustrate the law by the instances of its application that are related by them and are looked upon as precedents.

Sub-Sec. II—Customs

What are customs ? —Divine will is evidenced also by immemorial customs, indicating rules of conduct ; in other words, such customs are presumed to be based on unrecorded revelation. The Privy Council in *Collector of Madura v. Mootoo* has thus stated the law on the subject: “ The duty therefore, of a European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal, and has there been sanctioned by usage. For, under Hindu system of law, clear proof of usage will outweigh the written text of the law.” (a) And similar reference to usage is made by Legislature in

(a) 12 M.I.A. 397. 436.

Acts which provide for the administration of law, unless the usage is contrary to justice, equity and good conscience, or has been declared to be void. (b) The Privy Council has held in *Neelkristo v. Beerchandra* (c) that where custom is proved to exist, it supersedes the general law which however, still regulates all outside the custom. This principle has been approved of by the same Board in the case of *Tara Kumari v. Chaturbhuj*. (d)

The definition of custom.—The Privy Council explains Custom thus: “Custom is a rule which in a particular family or in a particular district has from long usages obtained the force of law. It must be *ancient, certain* and *reasonable* and being in derogation of the general rules of law, must be construed strictly.” (e) But one must not suppose that customs as a rule are always in derogation of the general rules of law, for there may be many rules which custom only supplements.

Division of customs.—Customs may be divided under three heads, namely:—(1) Local customs, (2) Class customs, and (3) Family customs.

1. Local customs are binding on all the inhabitants of a particular locality which may be the whole country, or a province or a diistrict, town, or even a village.

2. Class customs are customs of a caste, or of a sect, or of the followers of a particular profession or occupation such as agriculture, trade, mechanical art and the like.

3. Family customs are confined to a particular family, such as those governing succession to an imparible Raj.

(b) Bombay:—Bom. Reg. IV of 1827, 26; Act II of 1864, 15; Burma:—Act XVII of 1875, 6; Central Provinces:—Act XX of 1875, 5; Madras:—Act III of 1873, 16; Oudh:—Act XVIII of

1876, 3; Punjab:—Act XII of 1878, 1; Bengal:—Act VIII of 1885, 183.

(c) 12 M.I.A. 523.

(d) 42 I.A. 192.

(e) 3 I.A. 259, 285.

Similar to them are the usages of succession to *maths* or religious foundations.

Essentials of customs.—*Antiquity, certainty, reasonableness and continuity* are essential to the validity of a custom. (f) On this subject the Privy Council observes as follows: “ Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be *ancient* and *invariable* and it is further essential that they should be *established to be so by clear and unambiguous evidence.*” (g)

Family and local custom.—The foregoing observations apply both to family and local custom: a family usage also must be ancient and invariable, and being in derogation of ordinary law must be satisfactorily and strictly proved.

But a family usage differs from a local custom in this that it may be given up and discontinued, and the discontinuance whether accidental or intentional will have the effect of destroying it. On this subject Privy Council remarks: “ Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family.” (h)

For the validity of a family custom it is not necessary that the family should possess an estate which is technically

(f) 42 C. 455.

(g) 14 M.I.A. 570, 585-586.

| (h) 1 C. 186, 195. See 24

C.W.N. 60; M.L.J. 562.

known as a *Raj* in the north of India or a *Polliem* in the south of India. (i)

Creation of custom.—“No reason, even the highest whatsoever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom.” (j) Customs may be similar or contradictory, probable or improbable.

Extinction of custom.—But the non-existence of the circumstances which gave rise to a particular custom, does not destroy the custom. (k) But a family custom may be, destroyed as stated before, (l) intentionally or by accidental causes.

Customs and usages.—Although the terms *Custom* and *Usage* are often used as convertible terms, still sometimes a distinction is drawn between them, and the former is applied to those rules of which antiquity is an essential incident, and the latter is used to designate those that may be of recent origin, such as those relating to trade or agriculture.

With respect to mercantile usage, the Privy Council observes: “There needs not either the antiquity, the uniformity or the notoriety of custom which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.” (m)

Evidence relating to custom.—The evidence of custom must be *clear* and *unambiguous*, (n) and such as

(i) 2 I.A. 263, 269; 36 I.A. 125, 136; *see*, 50 I.A. 58; family custom recognized 29 C.W.N. 106 P.C.

(j) 37 C. 322, 326.

(k) 24 C.W.N. 601 P.C.; *see* 55

C. 403 P.C.

(l) *See p. 6* “Family and local custom.”

(m) 7 M.I.A. 269, 287.

(n) 55 C. 403 P.C.; *see* 48 C. 643.

would prove *antiquity*, *uniformity* and *continuity*, (o) as well as *publicity* and also the conviction of those following it that they were acting in accordance with law. The evidence of custom must be strictly construed. (p)

Onus.—The burden of proof as to the existence of a custom rests on the person who sets up a custom contrary to law. (q)

Customs not enforceable.—Though a custom may be clearly established, it cannot be enforced if it is against public policy (r) or is contrary to legislative enactment, (s) or is immoral. (t)

Sub-Sec. III—Commentaries

Commentaries.—The Sruti and the Smriti are, theoretically speaking, the sources of law. But all these are now practically replaced by the *Nibandhas* or digests or commentaries that are accepted as authoritative expositions of Hindu law in the different provinces. The commentators profess to interpret the law enunciated by the Smritis or Codes of Hindu law.

This fiction of interpretation is found in every system of law. A rule of law is sometimes enlarged in its operation so as to include a case not covered by its language or curtailed so as to exclude a case that falls within its terms ; and this is designated rational interpretation based upon intention. Whenever there is a rule that is rigid in theory, and one wished to get out of its terms, he must have recourse to the fiction mentioned above. The commentaries, however, have replaced the Smritis ; and it is not open to any one to examine whether a particular position maintained by an authoritative commentary which is accepted as such in a locality, is really supported by the Shastras. (u)

(o) 18 C.W.N. 559.

(r) 4 I.A. 76, 85.

(p) 3 I.A. 259, 285.

(s) 15 M. 323. (t) 18 I.C. 979.

(q) 32 C. 6, 11; 51 M. 1 F.B.;
38 B. 183; 39 C.L.J. 100.

(u) See *Atmaram v. Bajirao*,
62 I.A. 139.

Clear texts and principles. —But it must not be supposed that the commentators have no respect for the Smritis, and have always disregarded or discarded them for the sake of any principle introduced by them. On the contrary, when there is a clear and unambiguous text laying down a particular rule, effect is given by them to it, although the same is inconsistent with any principle referred to by them. In fact, they refer to common feature while dealing with individual cases, from which a general principle may be deduced. The generality of the expressions that may be found in some instances were not intended to be expositions of the whole law and cannot be taken to establish a proposition that may seem to follow logically from them, since the law is not always logical. (v)

The following are some of the important commentaries:—

Ashtavinsati Tattva—or twenty-eight discourses or books by Raghunandana Bhattacharya of Nabadwipa who is respected in Bengal, is also known as Smriti-Tattva and deals mainly with ritual. One of the books, called Dayatattva, however, deals with the substantive law of inheritance.

Dayabhaga—of Jimutavahana who flourished in the last quarter of the eleventh or the first quarter of the twelfth century, is not a commentary on any particular code but professes to be a digest of all the codes, while it maintains that the first place ought to be given to the Code of Manu. This commentary, or that portion of it which is now extant, is confined to the subject of partition or inheritance alone. It is deemed as an enactment amending the Mitakshara law in Bengal. This view follows from the cases of *Collector of Madura*, (w) *Bhugwandeen Doobey* (x) and *Kerry Kolitanee* (y) after reference to a passage of the Mita-

(v) Quinn v. Leathem, H.L., (1901) A.C. 495, 506.

(w) 12 M.I.A. 397. (x) 11 M.I.A. 487, 507.

kshara in a Bengal case, the same view has been explained thus: "It is true that there is no special discussion on this point in Dayabhaga, but the reason of this omission is obvious. The authority of the Mitakshara, it should be remembered, was at one time supreme even in Bengal and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in that school..."

Mitakshara—which is anterior to Dayabhaga is a running commentary on the Institutes of Yajnavalkya, by Vijnaneswara also called Vijnana-Yogin, an ascetic or a Sannyasi, who cites texts of other sages, and reconciles them where they seem to be inconsistent with the Institutes of Yajnavalkya. It is universally respected throughout the length and breadth of India, except in Bengal where it yields to the Dayabhaga on those points only in which they differ. But it may be consulted as an authority even in Bengal regarding matters on which the Dayabhaga is silent. It is a commentary on all branches of law in its widest sense. The approximate date of the work must be before 942 A.D. which is the probable date of the Dayabhaga.

In Schools of Hindu law other than Bengal, the authority of the Mitakshara has been to some extent modified by still modern commentators respected in different Schools.

Saraswati-Vilasa —is a work of paramount authority in the territories under the Government of Madras and Orissa.

Smriti-Chandrika—of Devananda Bhatta is the earliest and foremost authority in the Dravida or the Madras School

(y) 19 W.R. 367, 372 affirmed by P.C. 7 I.A. 115, 126.
H. L. 2

i.e., in the country occupied by the Hindus of Dravida, Tailangana and Karnata or the greatest part of the Peninsula or the Deccan.

Viramitrodaya—by Mitra Misra generally follows and maintains the doctrines of the Mitakshara. It refutes the contrary doctrine of the Bengal School meeting the arguments put forward by the founder of that School and by his follower Raghunandana, the author of the Dayatattva, to support the positions that are opposed to the Mitakshara School. In the *Unchastity case* the Judicial Committee has held that the Viramitrodaya “may like the Mitakshara, be referred to in Bengal in cases where the Dayabhaga is silent.” (z) The Viramitrodaya is relied on in all the Schools except Bengal.

Vyavahara Mayukha—is a work of Nilakantha which deals with litigation or jurisprudence. Vyavahara-Mayukha came to be regarded as an authority concurrently with the Mitakshara by the *Maharastra Brahmanas* of the Bombay Presidency. (z1) In Guzrat and the island of Bombay (z2) also in North Konkan (z3) the Mayukha is paramount to even the Mitakshara. In Ahmednagar, Poona and the Khandesh, the Mayukha is an authority though not capable of over-ruling the Mitakshara. But the Mitakshara ranks first and paramount in the Maratha country and in Northern Canara as also in Berar.

Sub-Sec. IV—Interpretation of Texts

Conflict. —When there is a conflict between two texts, of the Sruti or of the Smriti, they are to be presumed to relate to different cases ; but where a text of the Sruti is opposed to one of the Smriti, the former must prevail.

(z) *Moniram v. Keri*, 7 I.A. 115.

(z2) *Lallubhai v. Mankuvarbai*, 438. 2 B. 418; 14 B. 612, 623.

(z1) *Collector of Madura v. Mootoo*, 12 M.I.A. 397.

(z3) 3 B. 353.

But in a conflict between a Smriti and a Purana the former shall be followed. In case of difference between a commentary (*Nibandha*) and a Smriti the former is to be followed. (1) But clear proof of custom outweighs written texts of law. (2)

This conflict of law, the commentators attempt to get over in the following way:—where a precept forbids men to do what they may do under the natural impulses, it is called a *Nishedha* or prohibition; but where a precept enjoins men to do a certain thing, when no reason could be suggested for doing it, it is called an *Utpatti-vidhi* or an injunction creating a duty; and a precept regarding what men may do of their own accord may come within the purview of the Shastras, if it enjoins that act at a particular time or place: such a precept is called a *Niyamavidhi* or restrictive injunction; there is a third kind of *vidhi* or injunction called *Parisankhya* which is an injunction in form, but a prohibition in purport; but precepts that do not fall under any one of the above descriptions are called *Anuvada*, superfluous rules that need not have been laid down in the Shastras.

The Mitakshara cites and follows a text which runs thus:—“ Practise not that which is legal, but is abhorred by the world, for it secures not spiritual bliss.” This text suggests that popular feelings override an express text of law contained in the Shastras, taking of course, the term law in the limited sense of lawyers.

Factum Valet.—On the very same principle does rest the so-called doctrine of *factum valet quod fieri non debuit* (what should not be done, yet being done, shall be valid), thought to be peculiar to the Bengal School and enunciated for the first time by the author of the Dayabhaga, the founder of that School. The Privy Council in *Wooma*

(1) Atmaram *v.* Bajirao, 62 | (2) Collector of Madura *v.* Mootoo, 12 M.I.A. 397,436
I.A. 139.

Daee's case (*a*) has held that the doctrine is recognized by the Mitakshara School also. There were difference of opinion as to what was intended by the author of the Dayabhaga in the passage. "A thing (or the nature of a thing) cannot be altered by a hundred texts," (*factum valet.*) The Privy Council thus explains this maxim:—"That unhappily expressed maxim (*factum valet*) clearly causes trouble in Indian Courts. Sir M. Westroop is quite right in pointing out that if the *factum*, external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law." (*b*)

Sub-Sec. v—Case Law

Case law. —The important source of the present Hindu law is the case-law consisting of the decisions of the Judicial Committee of His Majesty's Privy Council and of the Highest Courts of Justice in this country. These have practically superseded the *Nibandhas* or Commentaries.

Stare Decisis & Communis Error Facit Jus. —Whilst considering the above observations it must be specially noted that the law as laid down in the decided cases must be accepted for the present as settled law and justice will be administered in the Courts in accordance therewith, so long as they are not upset by authority. When a particular view of law has been taken in a series of cases, the judges,

(*a*) 5 I.A. 40, 53.

(*b*) Sri Balusu *v.* Sri Balusu, 26 I.A. 113, 144.

though convinced of its erroneousness, are bound to follow it otherwise they might disturb innumerable titles.

Application of the principle.—The following two observations of the Lord Chancellor with respect to precedents are important: “*One* is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The *other* is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumed that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.” (e)

Sec. 2—SCHOOLS OF HINDU LAW

Origin of schools of Law.—The Privy Council in the case of *Collector of Madura v. Mootoo*, (f) thus explains the growth of the different schools: “The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitakshara, which is universally accepted by all the schools except that of Bengal, as of the highest authority and which in Bengal is received also as of high authority, yielding only to the Dayabhaga in those points where they differ, was commentary on the

(e) Quinn *v. Leathem*, A.C. | C., i. 10.
(1901), 495, 506; see 43 | (f) 12 M.I.A. 397, 435.

Institutes of Yajnavalka ; and the Dayabhaga which wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnavalka, in like manner there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that Treatise, but are not received by all."

Mainly two schools. —The different commentaries have given rise to the several schools of Hindu law, which are ordinarily said to be five in number. But properly speaking there are only two principal schools, namely the Mitakshara and the Dayabhaga schools.

The Mitakshara school —may be sub-divided into four or five minor or subordinate schools that differ in some minor matters of detail, and are severally accepted in the different Provinces, where the Mitakshara is, concurrently with some other treatises or with local customs, accepted as authority, the former yielding to the latter, where they differ.

The following are the different schools of law:—

(1) BENGAL OR DAYABHAGA OR GAURIA SCHOOL

The Presidency of Bengal and Assam and some of the adjoining places are governed by this School. The following commentaries are the chief exponents of this school:—

1. Dayabhaga,	4. Daya-Krama-
2. Mitakshara,	Sangraha,
3. Dayatattva,	5. Viramitrodaya,
	6. Dattaka-Chandrika

(2) BENARES OR NORTHERN SCHOOL

Excepting in Mithila and the Punjab, this school prevails

in the whole of Northern India including Orissa. (g) The commentaries respected in this school are the following:—

1. Mitakshara,	4. Nirnaya-Sindhu,
2. Viramitrodaya,	5. Vivada-Tandava.
3. Dattaka-Mimansa,	

(3) MITHILA OR NORTH BEHAR SCHOOL

The districts of Tirhoot and parts of the districts of Purnea, Bhagalpur, Monghyr, Saran and Muckwane may be identified with Mithila. In this part of the country the Mithila school prevails, which is the law of Mitakshara except in a few matters in respect of which the law of this school has departed from that of the Mitakshara. (h) The following are the commentaries respected in this school:—

1. Mitakshara,	4. Smriti-Sara or Smrityartha-Sara.
2. Vivada-Ratnakara,	
3. Vivada-Chintamani,	5. Madana-Parijata.

(4) BOMBAY OR MAHARASTRA OR WESTERN SCHOOL

The Bombay school of Hindu law prevails in almost the whole of the Presidency of Bombay, Sindh and Berar. (i) The authorities respected in the school are the following:—

1. Mitakshara,	4. Nirnaya-Sindhu,
2. Vyavahara Mayukha,	5. Parasara-Madhaba,
3. Viramitrodaya,	6. Vivada-Tandava.

(5) MADRAS OR DRAVIDA OR SOUTHERN SCHOOL

The whole of the Madras Presidency is governed by the Madras school of Hindu law. The authorities respected in this school are the following:—

1. Mitakshara,	6. Dattaka-Chandrika,
2. Smriti-Chandrika,	7. Daya-Vibhaga,
3. Parasara-Madhaba,	8. Kesava-Vaijayanti,
4. Saraswati-Vilasa,	9. Nirnaya-Sindhu,
5. Viramitrodaya,	10. Vivada-Tandava.

(g) Orissa governed by the Mitakshara School as administered in Bengal: *Parbati v. Jagadish*, 29 I.A. 82, 88.

(h) *Sourendra v. Hari*, 52 I.A. (i) 1930 N. 265.
418; 12 P. 359; 13 P. 550.

(6) PUNJAB SCHOOL

To the above named schools this may be added as one of the schools. It prevails in the part of the country called the Punjab and is generally guided by customs. The following are the authorities in this school:—

1. Mitakshara,	3. Punjab customs.
2. Viramitrodaya,	

Sec. 3—HINDU LAW AND ITS APPLICATION

Sub-Sec. 1—Persons governed by It

Who are Hindus?—The derivative meaning of the word “Hindu” is one who condemns the degraded people, i.e., one who condemns the low people or bad acts. But it seems more probable that the name has been derived from that of the river Sindhu or the Indus. The country round the river Sindhu is the place where the Indo-Aryans first settled, and this part of the country was called Shindhustan. The Persians and the people of the neighbouring countries, who pronounced the alphabet (*Sa*) as (*Ha*), called Sindhustan as Hindustan. Gradually the name has been applied to the whole of India, and during the Mahomedan rule, the original Aryan settlers became known as Hindus. The word is not to be found in any ancient text.

The Hindus are those who profess any form of the religion of the Vedas or as explained in the Puranas called Brahmanism. (j) These are not a homogeneous system of belief but in a large measure, have been derived from prior Brahmanical faiths.

Hindu by birth governed by Hindu law.—The Hindu law applies to Hindus by birth that have not openly renounced Hinduism by adopting any other religious persuasion. So it is not sufficient to bring a man within the definition of Hindu to prove his Hindu birth of origin, but

(j) 15 C.W.N. 158; 19 B. 783; 37 I.C. 780.

it is essential that he should be a Hindu at the time when the question in issue arises.

Other communities governed by Hindu law. —The following communities are partially or wholly governed by Hindu law:—

Arya Samajists are Hindus and hence the *Dayanandis*, a sect of the Arya Samajists are governed by Hindu law.

Brahmos are governed by Hindu law in matters of succession.

Buddhists who had been Hindus notwithstanding their renunciation of Hindu religion and usage continued to be governed by Hindu law.

Jains appear to be a sect of the Buddhists and “ may not unfairly be described as a compromise between Hinduism and Buddhism.” (k) They as well as the *Agarwalla Jains*, are governed by Mitakshara school of Hindu law. (l) and it is for him to prove that any custom other than the Hindu law of the country where the property is situate and the parties reside, exists.

Jats in the absence of special custom are governed by Hindu law.

∴ *Memons*. —The *Cutchi* or *Kutchi Memons* of Bombay (m) and of Sindh (n) are governed by Hindu law of succession and inheritance. The *Halai Memons* domiciled in Porebunder follow Hindu law in matters of succession of women. (o) But by a declaration made under *Cutchi Memons Act* (p) any person belonging to that sect may adopt Mahomedan law in matters of succession and inheritance. But under the Muslim Personal law (*Shariat*) Application Act (XXVI of 1937), they will be governed by the Muslim personal law in all matters mentioned in the Act.

(k) *Sheokuarbai v. Jeoraj*, 25 C.W.N. 273 P.C.

(m) *Abdurahim v. Halimabai*, 43 I.A. 35; 54 B. 358.

(l) *Rupchand v. Jambu*, 37 I.A. 93; 5 I.A. 87 and 14 L. 78 and 95.

(n) 78 I.C. 871.

(o) *Khatubai v. Mahmed*, 50 I.A. 108.

(p) *Act XLVI of 1920*.

Navayats of South Carnara are Mahomedans but they have adopted many incidents of the joint family law of the Hindus. (q)

Sikhs were originally Hindus and they continued to be governed by Hindu law excepting the law relating to marriage. (r) The *Nirmalas* were a sect of the Sikhs but they have lost their importance and have merged to a very large extent amongst the Hindus. (s)

Evidence of adoption of Hindu law.—The Privy Council has laid down that a family that was not Hindu by descent and origin, but had gradually adopted Hindu customs, was not on that account to be governed by Hindu law in all matters unless proved to have been introduced into it as its custom. (t)

Sub-Sec. II.—Religion and Conversion

Renunciation of Hinduism.—A Hindu as soon as he embraces another religious faith such as Christianity, (u) ceases to be a member of a Hindu joint family; but the particular member will continue to hold the family property as joint owner. (v) His right to survivorship, however extinguishes (w) from the moment of his conversion as the disruption of the coparcenary is thereby effected.

By the Indian Succession Act a Hindu apostate to Christianity cannot choose to be governed by Hindu law in matters of succession. (x)

A Hindu by birth who gives up the orthodox habits in matters of diet and ceremonial observances is still governed by Hindu law, relating to succession, inheritance and

(q) 41 I.C. 184.

(r) Rani Bhagwan v. J. C. Bose, 30 I.A. 249; 59 I.A. 147.

(s) 1930 L. I.

(t) Fanindra Raikat v. Rajeswar, 12 I.A. 72.

(u) Abraham v. Abraham, 9

M.I.A. 159; 40 C. 407.

(v) Kulada v. Haripada, 40 C. 407.

(w) 40 C. 407.

(x) Kamawati v. Digbijai, 48 I.A. 381.

other personal law. The Privy Council thus explains the law: “ * * * such lapses from orthodox practice (in matters of diet &c.) could not have the effect of excluding from the category of Hindu in the Act (V of 1881) one who was born within it, and who never became otherwise separated from the religious communion in which he was born.” (y)

Legislation protecting Hindu apostates. —The Legislature has prevented a Hindu being penalized by depriving him of his right to property for renunciating the Hindu religious faith. (z)

Conversion and re-conversion to Hinduism. —A Hindu converted to any other religious persuasion may revert back to Hinduism on performing the religious rite of expiation. His infant son may, likewise, with his consent and approval, revert back to Hinduism. (a)

A non-Hindu by birth can embrace Hinduism according to judicial decisions. (b)

Sub-Sec. III—Migration and Schools of Law

The schools of Hindu law applying as they do to Hindus of particular localities, may be called *quasi-territorial*. It is a *prima facie* presumption that a Hindu is governed by the school of law in force in the locality where he is domiciled, (c) and that prevailing among his caste-fellows in the locality. (d) But this presumption may be rebutted by proof that the family to which he belongs had migrated from another province in which a different school prevails; for, in such a case, the presumption of law is in favour of the retention by

(y) 30 I.A. 249.

(z) Reg. VII of 1832 and act XXI of 1850.

(a) See 30 C. 999.

(b) 1928 M. 1279; see, Gopal v. Sita Devi, 36 C.W.N. 392 P.C.; Sahdeo v.

Kusum, 50 I.A. 58;

Fanindra v. Rajeswar, 12 I.A. 72; Palaniappa v.

Alagan, 48 I.A. 539.

(c) 39 M.L.J. 427; 1938 N. 163.

(d) 49 A. 848.

the family of the law and usage of the country of its origin.(e) But this presumption again may be rebutted by proving that the family has adopted the law and customs of the place of its present domicile, and then it will be subject to the school prevailing in that place. (f)

The law is thus explained by the Privy Council in an appeal from East Africa. (g) "Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted."

Evidence of migration.—The *mode in which the religious ceremonies are performed* is relied on as the test for determining whether a family proved to have migrated from one province to another, adheres to the law of the former place or has adopted the doctrines prevalent in the place of its new domicile. (h)

It is of the first importance to enquire into the origin of the family. (i) The origin, if ascertained to have been in a different place, gives rise to the presumption that the family preserves the customs of its place of origin. (j) Of evidence which go to prove or rebut this presumption, the most direct are instances of *succession* in the family and next, ceremonies at *marriages, births* and *Shradhs*. (k)

Wife's domicile.—By marriage the wife acquires the domicile of the husband and the domicile continues during the widowhood unless she adopts a new domicile. (l)

Sub-Sec. IV—Hindu law, now in force

Under the British rule the Hindus have been suffered to

(e) 43 B. 647; 1938 P. 337.

(f) 20 C. 409; 40 C. 407; 24 C.W.N. 215; Balwant *v.* Baji, 47 I.A. 223.

(g) Abdurahim *v.* Halimabai, 43 I.A. 35, 41.

(h) 2 M.I.A. 132; 47 I.A. 213.

2 M.I.A. 132; 47 I.A. 213.

(i) See foot note (c) above.

(j) See foot note (e) above.

(k) Parbati *v.* Jagadish, 29, I.A. 82; 1934 P. 260.

(l) 19 B. 697; see post Ch. III Sec. 7.

be governed by their own law as regards *Succession, Inheritance, Marriage, Religious Institutions and Caste.* (m) Hindu law has therefore become the personal law of the Hindus.

The following enactments have modified, supplemented and superseded Hindu law or custom:—

Act V of 1843 of Governor-General's Council (Abolition of Slavery Act) has abolished slavery.

Act XXI of 1850 of Governor-General's Council (Freedom of Religion or *lex loci* Act) repeals those provisions of the Hindu law that exclude from inheritance persons professing a religion different from that of the person, succession to whose estate is in dispute. (n) Where once a person has changed his religion and changed his personal law the religion and law adopted will govern the rights of succession of his children. (o)

Act XV of 1856 of Governor-General's Council (Hindu Widow Remarriage Act) legalizes the re-marriage of Hindu widows in certain cases and declares their rights and disabilities on re-marriage.

Act VII of 1866 of Bombay Council (Hindu's Liability and Ancestor's Debts Act) limits son's liability to pay father's debts to the extent of assets received by him.

Act XXI of 1870 of Governor-General's Council (Hindu Wills Act) and Act V of 1881 (Probate and Administration Act) extended to Hindu Wills certain provisions of the Succession Act (Act X of 1865) with some additions and alterations. But all these are incorporated in Act XXXIX of 1925.

Act IV of 1882 of Governor-General's Council (Transfer of Property Act) supersedes the Hindu law of transfer of property excepting certain limitations mentioned in sections 2 and 129 of the Act; but the limitations have been repealed by Acts XX, 1929 and V, 1930.

(m) Reg. IV of 1793, Sec. 15. (o) 35 C.W.N. 89 P.C.

(n) 38 I.A. 87.

Act XV of 1916 of Governor-General's Council (Hindu Disposition of Property Act) validates the disposition of property to unborn persons.

Act XLVI of 1921 of Governor-General's Council (Cutchi Memons Act) to enable those Cutchi Memons who so desire to be governed in matters of succession and inheritance by Mahomedan law. (See Act XXXIV of 1923.) .

Act XXX of 1923 of Governor-General's Council [Special Marriage (Amendment) Act of 1923 amending Act III of 1892]. This Act provides a form of marriage of Hindus otherwise than by Hindu rites and customs.

Act XII of 1928 of Governor-General's Council [Hindu Inheritance (Removal of Disabilities)] is to amend the Hindu law relating to exclusion from inheritance of certain class of heirs on account of physical defects excepting those governed by the Dayabhaga school.

Act II of 1929 of Governor-General's Council [Hindu law of Inheritance (Amendment)] is to alter the order of succession of the Mitakshara school regarding son's daughter, daughter's daughter, sister and sister's son.

Act XIX of 1929 of Governor-General's Council (Child Marriage Restraint) is to restrain the solemnisation of child marriage.

Act XXX of 1930 of Governor-General's Council (Hindu Gains of Learning) is to remove doubt as to the rights of a member of undivided family in property acquired by his learning (gains of learning).

Acts XVIII of 1937 and XI of 1938 of the Central Assembly (Hindu Women's Rights to Property) is to give better rights to women in respect of property.

The whole of the adjective law, as laid down by Manu (*p*) and Yajnavalkya (*q*) has been replaced by various legislative enactments.

(*p*) Manu Ch. VIII.

(*q*) Yajnavalkya, Ch. II.

CHAPTER II

(A)—Definitions (B)—Rules of Interpretation

(A)—Definitions

Sec. 1—GENERAL TERMS

'Daya.'—There is a difference between the two schools with respect to the meaning of the term *daya*. According to Viyannaneswara, the author of the Mitakshara, it is defined thus:—"The term *daya* signifies that wealth which becomes the property of another, solely by reason of his relationship to the owner." Jimutavahana the author of the Dayabhaga, however, says that the word *daya*, by derivation means gift, but in the law of inheritance, "The term *daya* is by usage employed to signify wealth in which proprietary right, dependent on relation to the former owner, arises on the extinction of his ownership by death natural or civil such as degradation, renunciation of worldly objects and retirement to a holy place for religious purpose."

This difference in the definition of the term *daya* arises in consequence of the Mitakshara doctrine of the right by birth of male issue in the property of the father and other paternal male ancestors in the male line. The Dayabhaga repudiates that doctrine. The Mitakshara adds that *daya* is of two sorts, namely, *a-pratibandha* or unobstructed and *sa-pratibandha* or obstructed. According to the Dayabhaga, *daya* is always obstructed, inasmuch as the right does not accrue during the life-time of the previous owner in any case.

Partition.—According to the Mitakshara,—“ Partition is the adjustment into specified portions, of divers rights (of the coparceners) which (divers rights) extend to the whole estate.” “ According to the Dayabhaga,—“ Partition is the manifesting or making known, by the casting of lots or otherwise, the proprietary right (of each coparcener), which had arisen in the land and moveables, but

which extended only to a *fractional portion of the same* that was previously unascertained, and was unfit for exclusive dealing by reason of there being no evidence of any ground of discrimination."

According to the *Mitakshara*, the right of each coparcener extends to the whole property ; but according to the *Dayabhaga*, it extends to a fractional portion only, or to that portion only which on partition is allotted to him ; or, in other words, coparceners take as joint-tenants under the *Mitakshara*, but as tenants-in-common under the *Dayabhaga*.

Gotra. —The *gotra* of a person is the name of the sage (*rishi*) from whom he or his agnate is supposed to have descended in the main line. The later Brahmana writers say that properly speaking Brahmanas alone belong to some *gotra* or other as being descended from the *rishi* who is the founder of the *gotra* or family ; but the three inferior tribes have no *gotra* of their own, their *gotra* being that of their *Guru* (preceptor of the Vedas) or priest. But this theory seems to be opposed to admitted facts ; for, Visvamitra, who was not a pure Brahmana by birth, is admittedly a founder of *gotra*.

Sagotras. —Two persons are *sagotras* or of the same family, if both of them are descended in the male line from the *rishi* or sage, after whose name the *gotra* or family is called, however distant either of them may be from the common ancestor.

Pravara. —The word cannot be logically defined as it will violate the fundamental rules of definition. It can be best described as follows :—The principal sages of a *gotra* or race by whom that race or its branch is distinguished from other *gotra* or the rest of the same *gotra* are called *pravaras*. For instance in the Visvamitra *gotra* there are three *pravaras*, namely, Visvamitra, Marichi, and Kausika of whom Visvamitra is the founder of the *gotra*, which is

distinguished from other *gotras* by having for its *pravaras* the sages Marichi and Kausika. All persons have not only a *gotra* but also a *pravara*. The number of rishis included in *pravara* is usually three but never exceeds five.

The Samana-Pravaras —are descendants in the male line of the three paternal ancestors of the founder of *gotra*.

Sec. 2—RELATIONSHIP

Sub-Sec. I—Sapindas

Sapinda. —The term *sapinda* means one of the same *pinda*. The word *pinda* is used in various senses. In the Hindu law books the term has been used in two different senses ; in the one sense, it means a relation connected through the same body ; and in the other, it means a relation connected through funeral oblation of food.

Sapindas according to Mitakshara. —In the Mitakshara the term *sapinda* is used in the sense of, one of the same body, *i.e.*, a blood relation. In this literal sense the term would include all relations however distant. But this derivative denotation of the term, is curtailed by technical limitations ; and so it includes relations within the seventh degree according to the Hindu mode of computation. Then again there is this further restriction that this term when used without qualification, signifies agnatic relations only, *i.e.*, the relations of the same *gotra* : the relations of a different *gotra* being included under the term *bandhu* in the Mitakshara.

According to the Mitakshara, therefore, the sapindas of a person are, his six male descendants in the male line, six male ascendants in the male line, and six male descendants in the collateral male line of each of the six male ascendants, altogether forty-eight relations. (a)

The lawfully wedded wives of these relation as well as of the person himself are his sapindas.

(a) See table *infra* p. 30.

As regards the Sapinda relationship of females with males, for purpose of the marriage, it extends to different degrees on the paternal and the maternal sides of the males, according to most of the sages.

Computation of Degree —The Hindu mode of computation of degrees is the same as that adopted by the Canonists and is different from the English or Civilian mode which is adopted in the Succession Act, Sections 25 and 26, and according to which one is to exclude the propositus, and count as one degree each ancestor and each descendant lineal or collateral, down to the relation whose degrees of distance from the propositus one is computing. According to the Hindu or Canonist mode which is also called the classificatory mode, one is to count the propositus as one degree, and then count his as many ancestors as will make up the given number, taking each ancestor as one degree, and then count as many descendants of the propositus himself and of each of the said ancestors, as together with the propositus or that ancestor respectively, will make up the given number.

Sapindas according to the Dayabhaga. —The above definition of *sapinda* is not altogether lost sight of, in the Dayabhaga. But the author of that treatise explains it to relate to marriage, mourning &c., and not to inheritance. For the purpose of inheritance he takes the word *sapinda* in the sense of one connected through the same funeral oblation.

According to the Dayabhaga as understood by the Full Bench in the case of *Guru Gobinda Shaha Mandal*, (b) the term *sapinda* includes three classes of relations.

The **first class** includes those relations of a person with whom that person, when deceased, and after the *sapindikarana* ceremony, partakes of undivided oblations. They

are his three male descendants in the male line, three male ascendants in the male line, and three male descendants in the male line of each of the three male ascendants or in other words, the son, grandson and great-grandson ; the father, grandfather and great-grandfather ; the brother, brother's son and brother's grandson ; the paternal uncle, his son and grandson ; as well as the paternal granduncle, his son and grandson ; altogether fifteen relations. The lawfully wedded wives of these relations as well as of the person himself are his sapindas, in this sense. (c)

The **second class** comprises those relation of a person that present oblations participated in by that person, when deceased, but do not partake of undivided oblations with him. They are the grandsons by daughter, of the person himself of his three paternal ancestors, as well as of the son and the grandson of the person himself and his three paternal ancestors—altogether twelve relations. (d)

The **third class** comprehends the three maternal grandsires, to whom the deceased was bound to offer oblation, and those relations that present oblations to them. They are the three maternal grandfathers, three male descendants of each of them, and the grandsons by daughter, of the three grandsires, and of two male descendants of each of the three grandsires, altogether twenty one relations. (e)

The list of relations falling under each class mentioned above, can be easily drawn if the following propositions be borne in mind in connection with the *Parvana Sraddha* ceremony, namely: (1) A person is bound to offer funeral cakes to his three immediate *sagotra* ancestors, male as well as female, and to his three immediate maternal male grandsires. (2) A person after his death, and after the *sapindikarana* ceremony partakes of undivided oblations with his three *sagotra* male ancestors with whom he is united by

(c) See table *infra* p. 28.

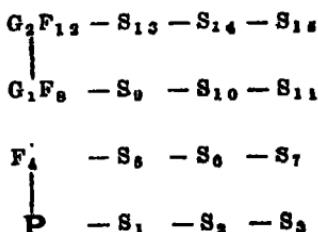
(d) See table *infra* p. 29.

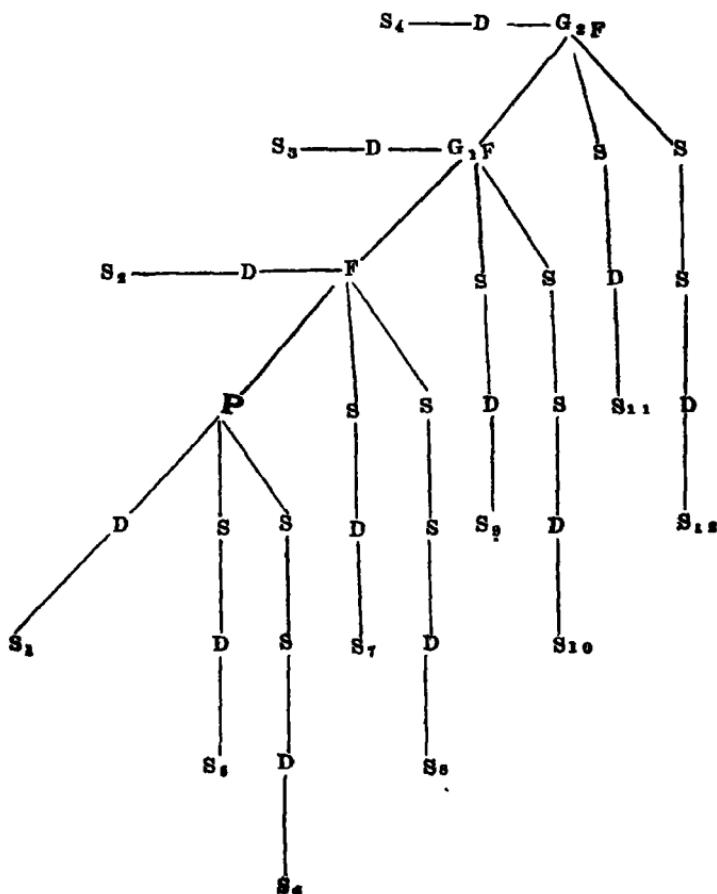
(e) See table *infra* p. 30.

that ceremony. The *sapindas* of a person are (according to the Full Bench) those relations with whom he partakes of undivided oblations, those who offer oblations enjoyed by him, those to whom he was bound to present oblations, as well as those who offer oblations to those to whom he was bound to present oblations.

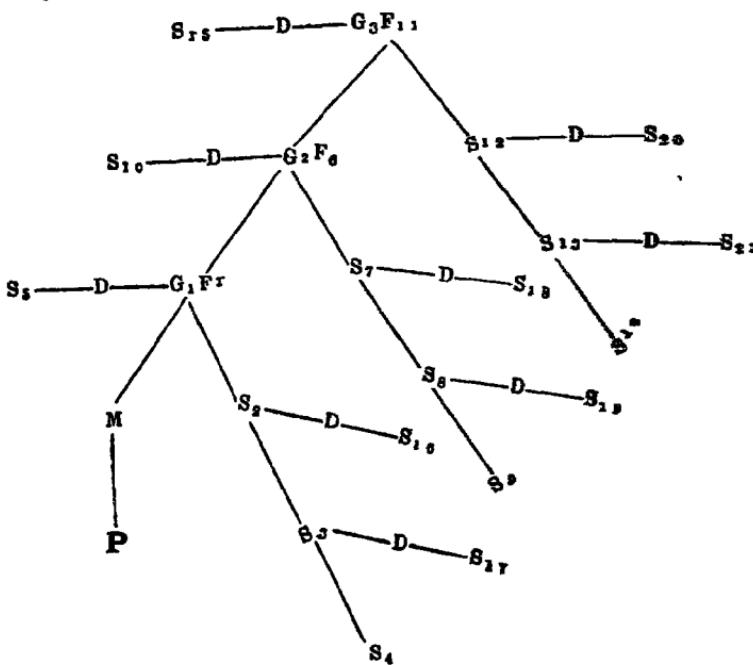
The following tables show *sapinda* and *sakulya* relationships:—

The first class *Dayabhaga sapindas*.

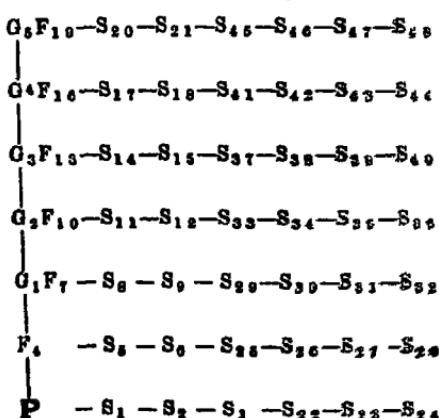


The second class *Dayabhaga sapindas.*

The third class *Dayabhaga sapindas.*

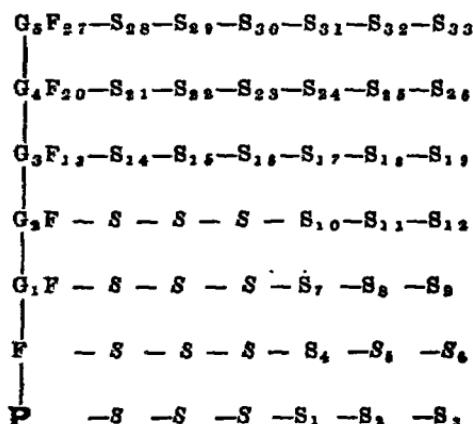


The *Mitakshara sapindas.*



Sub-Sec. II—Sakulyas

The first group of *Sakulyas.*



The term *Sakulya* means one belonging to the same *kula* or family and designates two groups of heirs according to the Dayabhaga. The *first* group of *sakulyas* of a person comprises the 4th, 5th and 6th male descendants in the male line of that person, and of his father, grandfather and great-grandfather ; and secondly it includes the 4th, 5th and 6th paternal male ancestors in the male line, and also six descendants in the male line of each of these ancestors ; altogether thirty three relations. The term *sakulya* therefore, includes those male *sapindas* according to the Mitakshara, that do not fall under the first class Dayabhaga *sapindas* as enumerated above. The term *sakulya* is not used in the Mitakshara for denoting any class of heirs.

Sub-Sec. III Samanodakas

The term *samanodaka* includes all agnatic relations of the same *gotra* or family, within fourteen degrees calculated according to the Hindu mode of computation ; that is to say,

thirteen male descendants in the male line, thirteen similar ascendants, and thirteen similar descendants of each of these thirteen ascendants, excepting, however, those included under the terms *sapinda* and the first group of *sakulya*. According to some, it comprises all such *sagotras* or agnatic relations whose common descent and name are remembered. The meaning of the term *samanadaka* is the same as *sagotra* in the Mitakshara: but in the Dayabhaga, it is limited as mentioned above.

Sub.-Sec. IV—*Bandhus*

Bandhu. —The term *bandhu* is used in the Mitakshara, and not in the Dayabhaga, to designate a class of heirs; and according to the Mitakshara, it means and includes the *bhinna-gotra sapindas* or relations belonging to a different family.

Meaning of sapinda in Mitakshara. —In explaining the term non-*sapinda*, the Mitakshara says, that the word *sapinda* means one connected through the same body i.e., any blood-relation however distant. It is observed that the husband and the *patni* or lawfully wedded wife become *sapindas* to each other in this sense, because a text of revelation says, that the sacrament of marriage unites them “bones with bones, flesh with flesh, and skin with skin.”

Sapinda relationship for marriage. —In explaining the word non-*sapinda* it has been said that *sapinda* relationship means immediate or mediate connection through same body, but as such connection may be taken to exist between all persons, marriage itself would be impossible; hence Yajnavalkya has declared that if the bride be “beyond the fifth and the seventh degree from the mother and the father respectively, she may be espoused.” The Mitakshara adds that *sapinda* relationship should be taken to cease beyond those degrees.

The Mitakshara does not say whether or not the lines of the seven and the five ancestors of the propositus on the paternal and the maternal sides respectively, may pass through males or females or both indifferently, although it is admitted on all sides that the lines of descent from those ancestors may pass through males or females or both without any distinction. But in illustrating the mode of computing the degrees, the Mitakshara refers only to the lines of the father's and the mother's male ancestors in the male line, though in computing five degrees the mother is counted as one.

Bandhus for inheritance according to Privy Council.—

The Privy Council in *Ram Chandra Mertand's* case (f) has held that the prohibited degrees for marriage are the same as *bhinna-gotra-sapindas* or *bandhus* for the purpose of inheritance. It has been followed by the Board again in *Adil v. Mahabir.* (g)

(B)—RULES OF INTERPRETATION *

The texts of the Vedas, Smritis, Puranas, &c. on which the fabric of Hindu law is founded are very few in number. The commentators have exhausted all their ingenuity in interpreting these texts in different ways to suit their own peculiar views. Rules of interpretations and legal maxims have thus grown up. Most of these rules are derived from *Jaimini's Mimansa*.

According to orthodox belief there is a text of the Vedas for every rule of law. If a text is not to be found in the Vedas corresponding to any rule of law, the existence of such a text has to be taken for granted. This may be called a legal fiction.

Rules for explaining apparently conflicting texts

I. Wherever contradictions exist between the Vedas, Smritis and Puranas, there the text of the Vedas is to be

(f) 4¹ I.A. 200. (g) 48 I.A. 86.

* Based on Dr. J. N. Bhattacharya's Commentaries on Hindu Law.
H. L. 5

followed ; but where a contradiction exists between a Smriti and a Purana, there the text of the Smriti is to be regarded as of higher authority. (*h*)—Jaimini 1, 3, 4.

2. Where the performance of an act is enjoined by one text and is forbidden by another, option has to be presumed.

3. The proper course for reconciling conflicting texts is either to assign them different fields for application, or to treat one of them as the general rule and the other as the rule for some special class of cases.

4. Where it is possible to reconcile apparently conflicting texts, they should not be so interpreted as to make them applicable to different subjects.

Construction of words

1. In the same passage a word occurring once cannot be taken in its primary and in its secondary sense.

2. Words which are defined in the Shastras ought to be taken in the sense given to them by their definitions.

3. In interpreting a word having a well known signification, the proper course is to take it in the sense given to it by popular usage, instead of extending or curtailing its denotation by metonymy.

4. The words in a text ought to be taken ordinarily in their plain meaning. But, for establishing harmony with other texts, and for reasonable interpretation, a word may be taken in an indefinite, restricted or metaphorical sense.

5. In an *utpatti vidhi* every word must be taken in its plain meaning, and not in a metaphorical sense.

6. The gender, number and qualifying adjectives of *uddeshya* words in a text may, as a general rule, be taken indefinitely.

7. The gender, number, and qualifying adjectives of *vidheyā* words in a text ought, in the absence of express

(*h*) See ante pp. 2-3.

authority to the contrary, to be taken definitely. Jaimini, iv, 1, 15.

8. In cases of doubt as to the construction of words like यावत् *yabat* denoting the limit of a series, its higher and lower limits should be included in it.

9. The article च *cha*, which means *and*, denotes that the words connected by it have to be taken as connected incidentally or collectively or severally or in a cumulative sense.

Rules relating to construction of texts

1. A text must be accepted as it is.

2. Wherever possible, the texts ought to be so interpreted as to show that the rule of law has its foundation in reason.

3. To interpolate words in a text is not proper where it is possible to supply the ellipsis by such words as occur in the context.

4. Effect should be given to every text and every word in a text.

5. A clause in a text, which seems like a reason for the rule of law enjoined by it, has, generally speaking, no significance whatever.

Rules relating to method of discussion

1. If two reasons are given, in the same clause, for any particular proposition, the reason last given is said to be by way of additional support ; and the reason may be rejected.

2. When in order to establish any particular proposition, several reasons are given in successive clauses, each successive reason being preceded by such words, as किञ्चित् &c., then the reason last given is to be accepted as the correct one in the opinion of the author.

3. When several alternatives are proposed or propounded, in the same sentence, with the word एव—(or) it

is to be understood that the author does not approve of any of them.

General principles of exegesis

1. A principle of law laid down with reference to one case may be applied to other analogous cases.
2. When the reasons for and against a point are nearly equal, a very little preponderance suffices to turn the scale.

CHAPTER III

MARRIAGE

Sec. 1—GENERAL DISCUSSION

Sub-Sec. i—Institution of marriage

Necessity of marriage, exception.—According to the Hindu *Shastras* it is the last of the ten sacraments or purifying ceremonies. The *Shastras* enjoin all men to marry for the purpose of procreating a son necessary for the continuation of the line of paternal ancestors and for the spiritual benefit of their and his soul. A Hindu may not at all enter into the order of householder or the married life.

Definition of marriage.—Marriage is defined by *Raghunandana* to be the acceptance by the bridegroom of the bride constituting her his wife. The Hindu law vests the girl absolutely in her parents and guardians by whom the contract of her marriage is made, and her consent or non-consent in her marriage is not taken into consideration at all. (j)

In ancient times marriage involved the idea of the transfer of dominion over the damsel from the father to the husband. A daughter was an item of property belonging to her father who could, therefore, transfer her by sale, gift or other alienation, like any other property ; and marriage consisted in the transfer, in any one of the said modes of

the paternal dominion over the bride, to the bridegroom who acquired by the transaction the marital dominion over her.

Hindu ideal of marriage.—The Hindu ideal of marriage is that it is a holy union for the performance of religious duties. The legal consequences of the approved and the condemned marriages, are different ; a wife married in an approved form becomes a *patni* but one espoused in the disapproved form does not become a *patni*. This distinction, however, is not recognised by the Courts, and wives espoused in the *Asura* form of marriage which though disapproved, is still prevalent among many classes of Hindus, and such wives enjoy the rights of *patni* or lawfully wedded wife.

Sub-Sec. II—Forms of marriage

Various forms of marriage.—The Hindu sages classed marriages into eight kinds for distinguishing approved from disapproved forms.

The following are the four approved kinds of marriages the male issue of which confers special spiritual benefit on the ancestors :—

In the **Brahma** form of marriage the father or other guardian of the bride has to make a gift of the damsel adorned with dress and ornaments to a bachelor of good character versed in the *Brahma* or *Veda*, who is to be sought out and invited by the guardian to accept the bride offered to him.

In the **Daiva** marriage the damsel is given to a person who officiates as a priest in a sacrifice performed by the father, in lieu of *Dakshina* or fee due to the priest ; it is inferior to the Brahma form because the father derives a benefit, which being a spiritual one is not deemed reprehensible.

Still inferior is the **A'rsha** marriage in which the bridegroom makes a present of a pair of kine to the bride's father which is accepted for religious purpose only, otherwise the marriage must be called *A'sura* described below.

The **Prajapatya** form does not materially differ from the *Brahma*. The bridegroom appears to be the suitor for marriage and he may not be a bachelor. The gift is made with the condition that "you two be partners for performing secular and religious duties."

The following four are disapproved kinds of marriages:—

The **Gandharva** marriage, which is not disapproved by some sages appears to be the union of a man and a woman by their mutual desire and to be effected by consummation ; this seems to be inconsistent with the father's *patria potestas* over the damsel and it appears to relate either to cases where a damsel had no guardian, or to cases where consummation by mutual desire had already taken place, and the law requires that the father should give his assent to the daughter's marriage with the man. *Gandharva* form of marriage has been held nothing more or less than concubinage and has become obsolete.

The **A'sura** marriage amounted to a sale of the daughter : the *Sulka* or the bride's price was the moving consideration for the gift by the father of the daughter in marriage.

The **Rakshasa** marriage was by forcible capture and was allowed only to the Kshatriyas or military classes. Among certain classes of the Gonds of Berar and Batul this form of marriage is prevalent.

The **Paisacha** marriage was the most reprehensible, as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drunk by administering intoxicating drug. It must not be thought that this is an instance in which fraud is legalised by Hindu law ; the real explanation appears to be that chastity and single-husbandness were valued most, and so the Hindu law provided that the ravisher should marry the deflowered damsel.

These eight kinds of marriages are not really eight different forms of marriage as they are loosely called ; the

forms appear to be the same in all cases except perhaps in the *Gandharva* and the *Rakshasa*, namely, the gift and acceptance of the damsel coupled with religious rites which are necessary and more multiplied in the approved ones.

Other forms.—Besides the eight forms mentioned above there are other forms of marriage which are valid by custom (*k*) and by statutes. (*l*)

Sub-Sec. III—Parties and marriageable age

Who are competent to marry.—Every Hindu is competent to marry unless he or she is otherwise prohibited. Marriage is more emphatically ordained for a woman than for a man. (*m*)

Of the ten *Samskars* or sacraments, marriage, like that of a *Sudra* male, is the only one for a woman. (*n*)

Disqualification for marriage.—The disqualifications for marriage are fewer in Hindu law than in other civilized systems of law. (*o*) Persons suffering from derangement of mind are not generally disqualified to marry, but the disqualification must depend on a question of degree. (*p*)

The Hindu law has laid down certain restrictions upon marriage which, however, with the change of ideas and feelings of the Hindu society, are now considered to be mere moral obligations. Instances of such injunctions are the marriage of a younger brother when the elder brother is unmarried, and the marriage of a younger sister before an elder sister.

Marriageable age.—According to the sages the marriageable age of a girl is between eight and twelve years and that of a man is between twenty five and thirty years.

(*k*) 23 A.L.J. 981.

(*l*) Hindu Widow Remarriage Act, XV of 1856; Special Marriage Act XXX of 1923; Arya Marriage Validating Act, XIX of 1937.

(*m*) Manu, IX, 4.

(*n*) Manu, II, 67; 34 M. 422.

(*o*) Banerjee's "Stridhana" 4th Ed. 9, 35;

(*p*) 38 I.A. 122, 125.

Child Marriage Restraint Act.—By this act (XIX of 1929) the marriage of a boy below the eighteenth year with a girl below the fourteenth year has been restricted and the violation of it is made penal.

Sec. 2—PROHIBITED RELATIONSHIP

Principles of prohibited relationship for marriage.—

The joint family system which is a cherished institution of the Hindus and which is the normal condition of their society, accounts for the prohibition by Hindu sages, of marriage between a larger number of relations than by other systems of jurisprudence. Those relations that are called to live together in the greatest intimacy from their birth, as well as those, who stand in *loco parentis* to the other, should not be allowed to entertain the idea of marrying each other, and an insurmountable barrier between their nuptial union should be raised in the form of legal prohibition.

Sages and Vedic texts on prohibited degrees.—The different sages have laid down different rules on prohibited degrees for marriage. Manu prohibits the largest number while Paithinasi the smallest.

Mitakshara on prohibited connection for marriage.—

The Mitakshara says that the qualification that the bride should be non-*sapinda* applies to all castes, for the *sapinda* relationship exists everywhere; but the qualification that she shall not belong to the same *gotra* and *pravara* applies only to the three regenerate tribes. (q) Although the *Kshatriyas* and the *Vaisyas* have no *gotras* of their own, and therefore no *pravaras*, yet as they have *gotras* and *pravaras* derived from their *Gurus*, the rule is applied to them also. Then the Mitakshara observes that as the qualification that the bride shall be non-*sapinda*, i.e.,

(q) See 42 I.C. 351; but valid among Baisi Chowrasi |

Gaddidars 46 I.C. 929;
See 59 I.A. 58.

non-relation, is too wide, according to the meaning of the word *sapinda* already explained, (r) therefore, Yajnavalkya has added—" *beyond the fifth and the seventh from the mother and the father respectively.*"

From the comments of the Mitakshara on that passage "*the fifth and the seventh*" are to be counted from the mother and the father respectively, and that the seven ancestors on the father's side and the five on the mother's may be traced through males or females, or both ; for although the Sanskrit word for degree is *purusha* which also means a male, yet it cannot on that account be contended that the lines must pass through the males only, inasmuch as, in computing the five degrees on the mother's side the mother is taken as one degree or *purusha*.

Later Commentators on prohibited degrees.—The rules regarding prohibited degrees extracted from the texts of the sages by Raghunandana in his *Udvahatattva*, is followed in Bengal. The same rules are reiterated by Kamalakara Bhatta, the author of the *Nirnaya-Sindhu* which is an authority in the Benares School.

The rules may be summarised as follows:—

I. A man cannot marry a girl of the same *gotra* or *pravara*. This rule is called exogamy. This rule does not apply to the *Sudras* who are said to have no *gotras* of their own ; but it applies to the *Kshatriyas* and the *Vaisyas* although it is alleged that neither have they any *gotra* nor *pravara* of their own. The *gotra* of these three inferior castes are said to be those of the *Gurus* or preceptors, or the priests of their ancestors.

II. A man cannot marry a girl who is a cognate relation of any of the following descriptions :—

(a) If she is within the seventh degree in descent from the father or from any of his male ancestors in the male line, namely, the paternal grandfather and so forth.

(r) *Ante p. 25.*

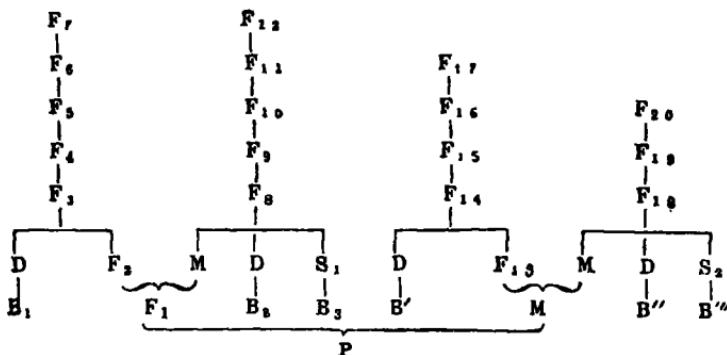
(b) If she is within the fifth degree in descent from the maternal grandfather or from any of his four paternal ancestors in the male line, the five degrees from the mother being counted by them exclusive of the mother.

(c) If she is within the seventh degree in descent from the father's *bandhus* or from any of their six ancestors through whom the girl is related.

(d) If she is within the fifth degree in descent from the mother's *bandhus* or from any of their four ancestors through whom the girl is related.

III. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the stepmother's sister, her brother's daughter and his daughter's daughter ; the paternal uncle's wife's sister, and the wife's sister's daughter and the preceptor's daughter. This rule appears to be of moral obligation only, since it is not respected. Accordingly, it has been held that a marriage between a Hindu and the daughter of his wife's sister is valid. (s)

The second rule is somewhat complicated. The following diagram will enable one to understand without difficulty, those that are prohibited by this rule, especially by Clauses (c) and (d).



(s) 20 M. 283; 43 M. 830.

P is the bridegroom. F₁ to F₇ are his seven paternal ancestors in the male line ; F₈ to F₁₂ are his father's five maternal ancestors in the male line ; F₁₃ to F₁₇ are his mother's five paternal ancestors in the male line ; F₁₈ to F₂₀ are his mother's three maternal ancestors in the male line ; B₁, B₂ and B₃ are his father's *bandhus* and B', B'' and B''' are his mother's *bandhus*.

The damsels that are prohibited to a man by the second rule are those that are within the seventh degree in descent from F₁ to F₁₂, from B₁, B₂ and B₃ and from S₁ ; and that are within the fifth degree in descent from F₁₃ to F₂₀, from B', B'', B''' and from S₂.

To this rule there is an exception, namely, that a girl, though within the seventh or the fifth degree as above described may be taken in marriage if she is removed by three *gotras*, or in other words, by two intervening *gotras*, so that there must be four different *gotras* in the line of relationship including those of the bridegroom and the bride ; but according to some, five such *gotras* are necessary. This shows that the lines of descent from the ancestors may pass through females also who are transferred by marriage to different *gotras*.

These rules are not all followed in practice.—It has already been said that these rules are not followed in practice. Different usages prevail among different tribes and in different localities. There is so much divergence between the sages as well as between the commentators on this subject that it would not be safe to enforce their views as binding rules of conduct.

Customs contrary to Smritis.—Even the custom of marriage within the *Gotra*, is found to prevail among certain sections of the Brahmanas (*i*) In Madras there is a custom prevailing even among the Brahmanas of marriage of a man

(*i*) See Sub-Judge's judgment in *Devi v. Rani Radia*, 31 I.A. 160.

with his maternal uncle's or paternal aunt's daughter. There is a text of the Sruti in support of this custom, and the instance of Arjuna's marriage with Subhadra, his maternal uncle's daughter, forms a well-known precedent.

The practical rule of prohibited degrees—for Courts in India to follow, is to pronounce a marriage to be valid, which has been celebrated in the presence and with the presumed assent, of the relatives and the caste-people on the principle of *factum valet*.

Sec. 3—INTERMARRIAGE

Sub-Sec. I—Castes

Caste System—is a peculiar social organisation of the Hindus. There being no rational principle upon which the hereditary caste system, irrespective of qualifications, could be based. In some of the Puranas castes are described as coeval with creation while there are others which say that originally there was but one caste which became multiplied in the *Treta* or third age of the world owing to deterioration of men. The Mahabharata asserts that at first there was no distinction of classes but these have subsequently arisen out of differences of character and occupation. The title of a person to recognition as Brahmana depended not on heredity but on possession of superior merits. But caste system has become hereditary and has lost the principle upon which it seems to have originally been founded.

Twice-born and Sudras.—The Smritis, which have thrust into prominence this system, divide men into two large classes, namely, the *Sudras* and the Twice-born. The study of the sacred literature forms the principle of this distinction. They ordain that by birth all men are alike to *Sudras*, and the second birth depends on the study of the sacred literature.

Number of castes.—There were originally four castes, namely, *Brahmana*, *Kshatriya*, *Vaisya* and *Sudra*; but

subsequently various mixed castes have come into existence by either intermarriage or illicit connection between them and their issue in all sorts of combinations, so that we find a distinct caste for each occupation which is said to be its own.

The Calcutta High Court has held that the *Kayasthas* are *Sudras*. (*u*) But the Allahabad High Court (*v*) has expressed considerable doubts as to the soundness of this view so far as that part of the country was concerned. The Patna High Court has held that *Kayasthas* are *Kshatriyas* but not *Sudras*, (*w*) even in a case in which the parties were Bengali *Kayasthas*. (*x*)

Sub-Sec. II—Inter-caste marriage

Sages and Mitakshara and Dayabhaga on inter-marriage.—The account of the origin of the mixed castes, as given by Manu and other sages, shows that there were many of them that sprung from sexual connection between inferior men and superior women.

Anuloma.—The sages lay down that marriage between persons of the same caste is preferable, and they also recognise marriage between a woman of an inferior caste and a man of a superior caste known as *anuloma* marriage. (*y*)

Pratiloma.—The sages do not say anything about the marriage between an inferior man and superior woman. There are, on the contrary, passages in the Smritis providing punishment for a man having sexual intercourse with a woman of a superior class. Thus they do, by implication, prohibit intermarriage between a man of an inferior tribe and a woman of a superior tribe which is called a *pratiloma* marriage. (*z*)

(*u*) 10 C. 688; 20 C.W.N. 901: (*P.C.* in 24 C.W.N. 794).

(*v*) 12 A. 328.

(*w*) 6 P. 506.

(*x*) 7 P. 245, *P.C.* in 10 P.187.

(*y*) 55 B. 1; 46 B. 871; 10 L. 372, 378; 1928 M. 1279, 1284.

(*z*) 14 Bom. L.R. 547. See 1928 M. 1279, 1284.

The Mitakshara and the Dayabhaga appear to take the same view.

Prohibition of inter-marriage by latest commentators.—

The latest commentators *Raghunandana* and *Kamalakara*, however, prohibit inter-marriage between the different tribes. But in this respect they differ from the Smritis, which recognize the lawfulness of marriage between a man of a superior tribe and a woman of an inferior tribe. And their view appears to be adopted by the Calcutta High Court which held that a marriage of a *Dome* Brahmana with a girl of the *Haree* caste is invalid, if not sanctioned by local usage. (a) The High Courts of Bombay (b) and Allahabad (c) have held the same view. So a marriage between a Brahmin woman and a man of *Khatri* by caste is held invalid under Hindu law. (d) A marriage between a man of *Jhabra* Rajput and *Tarkhani* woman has been held valid in the Punjab. (e) A decision of the Calcutta High Court has laid down that a marriage between a *Kayastha* and *Tanti* or a *Dome* is valid, unless the contrary is proved. (f)

Different sub-divisions of the same caste.—There is no text of Hindu law prohibiting an inter-marriage of persons belonging to the different sub-divisions of the same tribe or *varna*. A practice, however, has grown up and inter-marriage between the different sub-divisions of the same tribe does not now take place, although there is no legal bar to the same.

Converted Hindu's marriage.—A woman who is converted to Hinduism can contract a valid marriage with a Hindu. (g)

Arya Marriage Validating Act (XIX of 1937)—validates a marriage between two *Arya Samajists* even though before

(a) 9 W.R. 552.

(e) 10 I.C. 152.

(b) See 14 Bom. L.R. 547.

(f) 48 C. 926; 51 C. 488.

(c) 10 A.L.J. 181.

(g) 33 M. 342; 1928 M. 1279;

(d) 73 I.C. 239(L).

1928 P. 375.

marriage the parties belonged to different castes or different religious persuasions, provided the parties to the marriage were *Arya Samajists* before marriage.

Legislation on inter-marriage.—By Act XXX of 1923, which amends the Special Marriage Act, (Act III of 1872) marriages between different castes have been sanctioned. By a marriage under this Act a Hindu loses his right to marry another wife during the presence of one, or if he has a wife being married under the Hindu form.

Sec. 4—LIABILITY AND GUARDIANSHIP FOR MARRIAGE

Sub-Sec. i—Expenses of marriage

Marriage-samskara or sacrament.—Marriage is the last of the *Samskaras* or sacramental rites that are ordained to have the effect of purifying the body specially from inherited taint, if any. (gr) As regards the women, marriage is declared to be equivalent to initiation by the investiture with the sacred thread from which they are disqualified. The performance of this sacrament for both male and female children is an imperative duty imposed on the father. The father has to perform certain religious ceremonies connected with, and to bear the expenses of the marriage of sons.

Liability for expenses.—The father is legally liable to celebrate the marriage of his maiden daughters, and that the expenses of the marriage of a damsel, and her maintenance until marriage, form legal charges on the property of the family of which she is a member by birth. Even the daughters of those that are excluded from inheritance are to be maintained and married at the cost of the family property. A debt contracted for the marriage of a member is for the benefit of the family. But the expenses of a marriage performed after a suit for partition is filed, is not a charge on the estate, nor is the marriage expense of the

nephew of a member of a divided family binding on the divided member.

The *Dwiragamana* or *gamana* or *gowna* ceremony is in effect a part of the marriage ceremony. The expenses relating to such a ceremony is binding on the joint family estate.

Sub-Sec. II—Guardianship for marriage

Guardianship.—Hindu law does not contemplate marriage of males in their infancy, and so there is no rule regarding guardianship in their marriage. According to Hindu law a man attains majority after the completion of the fifteenth year, and this rule is unaffected by the Majority Act so far as marriage is concerned ; so a young man of that age is *sui juris* and may be taken to act for himself as regards his marriage.

The Shastras, however, enjoin early marriage of girls and rules are laid down relating to guardianship in their marriage. According to the practice the marriage contract is made by parents for children, so that the bridegrooms also are mere passive agents exercising no volition, their assents to their marriages are only inferred from the absence of dissents.

Yajnavalkya has laid down that the persons who are entitled to exercise the power to give a girl in marriage are in the following order: the *father*, the *paternal grandfather*, the *brother*, a *sakulya* or a member of the same family and the *mother*. Raghunandana places the *maternal grandfather* and the *maternal uncle* before the mother. The Mitakshara has adopted the rule laid down by Yajnavalkya without any such addition. It is worthy of notice that the mother, who is the nearest natural guardian, holds the last place in the above order.

The *Madras* High Court has held that after the death of the father, the mother, when she is the guardian of the person of the daughter, is competent to marry her daughter,

even if it is not proved that the paternal grandfather of the girl had wrongly and improperly refused to perform the marriage. (h) The same rule has been observed in the *Punjab*. (i)

A guardian must obtain the permission of the Court before marrying the lunatic under his care ; it was, however, not decided whether a male lunatic can contract a valid marriage according to Hindu law. (j)

The *Allahabad* High Court has held that the maternal relations of a girl have no authority to give her in marriage when there are competent paternal relations in existence, unless, such relations refuse to act or are disqualified from acting. (k)

Duty not right.—The above texts impose a moral duty on the relations in the order they have been enumerated than to lay down such a strict rule of priority between them as might invalidate a marriage that has actually taken place but not under the superintendence of a relation who is the guardian indicated by the above rule.

In the case of *Brindaban v. Chandra*, (l) the law is thus stated :—“ There can be no doubt that the uncle of the girl had a right in preference to the mother under the Hindu law to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided of course that the marriage was performed with all the necessary ceremonies.” This view has been adopted by some other High Courts, and the texts relating to guardianship have been pronounced to be directory and not mandatory. (m)

Betrothal.—Marriages are preceded by contracts of betrothal made in more or less solemn form by the guardians

(h) 35 M. 728.

(i) 3 L. 29.

(j) 32 M. 253.

(k) 38 A. 520.

H. L. 7

(l) 12 C. 140.

(m) 14 M. 316; 35 A. 652; 22

B. 509 and 812.

of the parties to them. But these contracts of betrothal are not considered to be binding or irrevocable, so as to be capable of specific performance. (n) But damages may be claimed and awarded for breaches thereof. (o)

Extinction of right of guardianship.—On the marriage of the minor girl, her father who was till then her natural guardian ceases to be so. (p)

Sec. 5—CEREMONIES

Religious rites.—The necessary ceremonies are the formal gift and acceptance, (p1) accompanied by religious rites (p2) consisting of the recitation of Vedic texts and the performance of the nuptial *Homa* called *Kusandika* including *Saptapadi-gamana* or walking seven steps. The *Vridddhi-sraddha* is not an essential ceremony ; and that if it be proved that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, it ought to be presumed that the marriage was good in law and that all the necessary ceremonies were performed. (q) In this case the performance of the ceremony of *Saptapadi-gamana* or walking seven steps, was not proved. If the performance of some of the ceremonies usually observed on the occasion of a marriage be proved, a presumption should be drawn that the marriage has been duly completed. (r) But if certain ceremonies which are in ordinary use for a valid marriage of a particular caste, are not performed, the marriage cannot be valid. (s)

The religious ceremonies including walking seven steps are not necessary in the marriage of non-virgins, whose marriage, therefore, may be performed in a secular mode. So also in a marriage of a widow all the usual ceremonies

(n) 24 W.R. 207.

(o) 21 B. 23.

(p) 51 M. 462; 28 C. 37. 49.

(p1) Manu, Ch. V. 152.

(p2) 60 B. 455; 1938 R. 111.

(q) 12 C. 140.

(r) 22 B. 509.

(s) 24 M.L.J. 271; 1 R. 129.

may not be observed. (*t*) Accordingly, religious ceremonies are not necessary in the re-marriage of women who are either widows, or relinquished, deserted or released by their living husbands, (*u*) prevalent amongst the lower castes in some parts of India, under the name of *Shunga* or *Sagai* in Bengal, *Karao* in the North-West part, and *Pat* or *Natra* in Bombay. But some customary secular ceremony is necessary, such as exchange of garland of flowers or the putting by the man of a red mark of vermillion on the forehead of the bride, in the presence of assembled friends and relations, (*v*) otherwise it would be difficult to distinguish *Gandharva* marriage from concubinage (*w*)

A marriage celebrated during a period of pollution is not invalid on that ground alone. (*x*) A marriage is not ineffectual in law if it is celebrated at an inauspicious time. (*y*)

Sec. 6—GHARJAMAI OR GHARDAMAD

Gharjamai and Ghardamad.—The usage of *Gharjamai* is a well-known institution prevailing among Hindus in all parts of India. (*z*) When the father or other guardian of a damsel is desirous that a girl should not leave her father's house after marriage and go over to her father-in-law's house to live with her husband there, but on the contrary, the son-in-law is to leave his own family and come over to his father-in-law's house to live there with his wife as a member of his father-in-law's family for ever, he is called a *Gharjamai*. According to this arrangement it is well understood, if not expressly stipulated by the guardians of both parties to the marriage, that the son-in-law is to receive a suitable maintenance from the same source from which the damsel is to

(*t*) 90 I.C. 1056.

(*w*) 3 A. 738. See 12 M. 72;

24 C.W.N. 958.

(*u*) 19 C. 627; 8 M. 440; 1934
A. 884.

(*x*) 22 M.L.J. 49.

(*v*) 3 C.L.R. 410.

(*y*) 31 I.C. 186.

(*z*) See 54 B. 548, 550.

be supported, *i.e.*, her father's estate of which she, or the son expected to be begotten on her by the *Gharjamai* is to become the heir.

His right to get maintenance from his 'father-in-law's estate is not affected by the subsequent death of his wife, nor by his marriage with another wife after the death of the former. The Court, under special circumstances, has power to pass a decree for separate maintenance. (*a*) It is to be proved that, *first*, there was definite intention of the parties that the status should be acquired, and *secondly*, the person taken as such, like adopted son, definitely foregoes his rights in natural family. (*b*)

Sec. 7—LEGAL CONSEQUENCES

Status. —The effect of marriage is the acquisition by the wife of the membership of the family, (*b1*) and the *gotra*, (*b2*) domicile (*c*) and sapindaship (*c1*) of the husband and is to place her under the control of the husband, (*c2*) who is entitled to the custody of her person when she is minor, even in preference to her father. (*d*)

Guardianship. —Though the legal effect of marriage is to transfer the girl under the control of the husband from that of the father, still when the husband is a minor he cannot be a guardian of his minor wife. (*e*) So, when the husband dies and the wife is a minor, her deceased husband's relations are entitled to be her guardian in preference to her paternal relations. (*f*)

Residence. —The wife is bound to reside with the husband wherever he may choose to live. (*fr*) The fact of the

(*a*) 12 C.L.J. 173.

(*c2*) 60 B. 455.

(*b*) 9 P. 683.

(*d*) 17 C. 298.

(*b1*) 55 A. 487.

(*e*) 30 M.L.J. 21, 27.

(*b2*) 58 A. 1053; 32 B. 300.

(*f*) 16 C. 584; *see* 33 A. 222.

(*c*) *See ante p. 20;* 19 B. 697.

(*fr*) 60 B. 455.

(*c1*) 14 P. 518.

husband having another wife will not relieve her from that duty: nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere. (g) The duty which Hindu law imposes on a wife to reside with her husband wherever he may choose to reside, is a legal and not merely a moral duty. But the wife's right of residence does not empower her to restrain her husband from alienating the family dwelling house. (h) Obedience and conjugal fidelity to the husband are duties at all times required of the wife who is not absolved from marital obligation by apostacy. (i)

A widow is not compelled to reside with the relatives of her husband; and her husband's relatives cannot compel her to live with them if she left her husband's residence from causes other than unchaste and improper purposes. (j)

Maintenance.—The husband is bound to maintain the wife, to provide a suitable place for her residence and to live with her. In the absence of any breach of conjugal duties, the wife is entitled to the right of maintenance against the husband personally even if he does not possess any property (j1) so long as he is alive, and against his estate after his death. (k) If being unchaste she is penitent, she has a right to a starving maintenance. (l) But if the wife resides in her father's house against the will of the husband or deserts (m) him without sufficient cause, she cannot claim maintenance while living separate from her husband. When she without justification lived apart from her husband for 23 years, she is not entitled to maintenance. (n) But when the husband habitually treats the wife with cruelty and such violence as to create serious apprehension for her personal

(g) 24 W.R. 377; 34 C. 971;

(i3) A. 126.

(h) 21 M.L.J. 303.

(i) 18 C. 264.

(j) Prithee Singh v. Ram,
I.A. Sup. Vol. 203; 1928
M. 216.

(j1) 60 B. 455.

(k) 1928 P. 375, 389.

(l) 39 M. 658.

(m) 1928 L. 502; 30 I.C. 934
(B).

(n) 1928 P.C. 187 reversing
1925 M. 757.

safety, she is justified in leaving her husband's protection and is entitled to separate maintenance from him. (o) So also a wife, whose husband is suffering from virulent type of leprosy, is entitled to live apart from her husband and claim maintenance. (p)

Marriage complete without consummation. — Marriage is a sacrament and it causes a permanent indissoluble union of the husband and wife extending to the next world ; and when it has been solemnized with the essential rites prescribed for matrimony, the status of husband and wife arises, and the marriage is complete and binding, although it may not be followed by consummation at all. (q)

Sec. 8—JUDICIAL PROCEEDINGS

Court's jurisdiction. — The validity of a marriage may be impeached in the Civil Court upon the ground of absence of consent of the parties or their guardians and of the use of fraud or force in bringing it about ; and it may be declared null and void. (r)

Setting aside marriage. — The *Madras* High Court (s) has held that the marriage of a girl given by her mother without the consent of the girl's father and falsely representing to the priest who officiated at the marriage that her father had consented to it, is valid.

The *Bombay* High Court (t) goes further and holds that neither the absence of consent of the guardian nor the fact that the marriage was effected in disobedience of an order of a competent Court, would render a marriage invalid on the doctrine of *factum valet*. The *Allahabad* High Court (u) holds the same view.

(o) 19 C. *..*.

(p) 45 M. 812.

(q) 9 M. 466; 50 I.C. 654.

(r) 14 W.R. 403; 1937 M. 332.

(s) 14 M. 316; *see* 1937 M. 332

(t) 22 B. 509, 60 B. 455; *see*

22 B. 812.

(u) 35 A. 265.

The Calcutta High Court, (*v*) however, applying the doctrine of *factum valet* has held that marriage is to be valid if all the necessary ceremonies were performed and if it was not procured by fraud or force.

If a marriage has been celebrated in the presence and with the presumed assent, of the relatives and caste people, it should not be set aside on the ground of being within prohibited degrees, (*w*) or on the ground of want of consent of the guardian (*x*) where no fraud or force is set up, (*y*) or because it is solemnized in contravention of an express order of the Court, (*z*) on the principle of *factum valet*.

Presumption of marriage.—When it is proved (*a*) that a marriage has been solemnized there will be a presumption of its validity, (*b*) and of the performance of all the necessary ceremonies. (*c*) So also it is to be presumed that a marriage was according to *Brahma* (*d*) or one of the approved forms. (*e*) The strongest presumption in favour of marriage arises when a man and a woman are recognised as husband and wife by all persons concerned and are so described in important documents and on important occasions; (*f*) but no amount of such evidence can establish a marriage where no valid marriage is possible. (*g*)

Marriage and legitimacy of child.—A child born in lawful wedlock is the legitimate issue of its parents and is entitled to all the legal incidents with which the law has clothed a son or a daughter. A child born even after the

(*v*) 12 C. 140 *see*, see 28 C. 37, 49.

(*w*) *Suptra* pp. 40, 44.

(*x*) 1 R. 129. (*y*) 35 A. 265.

(*z*) 2 L. 288.

(*a*) As to proof, *see* Section 50 of the Evidence Act (Act I of 1892) *Luchmi Koer v. Raghunath*, 27 I.A. 142 *see* 33 M. 342.

(*b*) 13 M.I.A. 141, 158; 38 I.A. 122; 22 B. 277, 279; 14 Bom. L.R. 547.

(*c*) 12 C. 140, 142, 143; 9 M. 466, 469, 470; 22 B. 509 512.

(*d*) 13 I.C. 644 (A); 53 I.C. 423.

(*e*) 11 M.I.A. 139, 175; 25 C. 354, 360; 32 M. 512; 9 N. L.R. 102; 34 B. 553, 559.

(*f*) 38 I.A. 122; Section 50 of Evidence Act (Act I of 1872).

(*g*) 2 L. 207; 34 M. 277.

death of his father, will be presumed his legitimate child, if born within 280 days after the death of his father the mother remaining unmarried. (h) The Privy Council (i) has held, that a child born in wedlock of a husband and wife, is not rendered illegitimate by the circumstance that he was begotten before their marriage. But the only natural son recognised by law and custom is the *aurasa* son. The *aurasa* son is defined by Yajnavalkya as the one begotten by the man himself on his lawfully wedded wife, (j) and not on the woman who was subsequently married by the begetter.

Marriage brokerage and consideration for marriage.—

An agreement to pay money to the parent or guardian in consideration of giving in marriage the son or daughter or ward is not valid and cannot be enforced by a suit. (k) But when the money is paid it cannot be recovered back. (l)

The Hindu law condemns the payment of any consideration for a marriage. In the *Brahma* form of marriage the bride adorned with dress and ornaments is given to the bridegroom and accepted by him, still all these nuptial presents belong to the bride. (m) In the *A'rsha* form the bridegroom makes a present of a pair of kine to the bride's father and accepted by the latter for religious purpose only. In the *A'sura* form the moving consideration for the marriage is the payment of *Sulka* or bride's price ; this form of marriage is condemned ; (n) but as Hindu law always lays down high ideals for chastity of women, it approves such a marriage when solemnized. In the *Brahma* and the *A'rsha* forms the dress or ornaments or the pair or kine are presents

(h) Sec. 112 of Evidence Act, (Act I of 1927).

(i) 1 I.A. 282, case begins at p. 287, decision at p. 293.

(j) Yajnavalkya 2,128.

(k) 15 C.W.N. 447, 453; 10 C. 1054; 22 B. 658, 663; 32 M. 185 F.B.

(l) 32 M. 185, 190 F.B.; 58 I.C. 963.

(m) *Vyasa* cited in D.B. iv I, 17; see ante p. 34.

(n) Manu Sec. 24 or Sir William Jone's Translation Ch. III, para, 25.

and given out of free will and cannot be called considerations for marriage.

Restitution of conjugal rights.—If one party is guilty of a breach of the marital duties the other may sue the former for restitution of conjugal rights. (n) Legal cruelty is a bar to restitution of conjugal rights ; but there may be circumstances which though short of legal cruelty, may nevertheless bar a suit for restitution of conjugal rights. (o) Ill health or inability to afford her husband the marital rights, is no ground for husband's refusal to give her protection, nor the refusal by parents of the wife to give him the custody of the wife is a ground for refusing the restitution of conjugal rights. (p)

Sec. 9—RE-MARRIAGE

Men.—A Hindu male can marry as many times as he likes even when another wife is living though this latter custom is extremely rare now. A married Hindu cannot, after embracing Christianity, take to himself another wife while his wife is alive. (q) Similarly, he cannot marry another wife under the Special Marriage Act while his wife married under Hindu rites or under Special Marriage Act is living.

Women.—The Hindu sages provide single-husbandedness as the most approved mode of life for women ; but they recognize, under certain circumstances, remarriage of women that are impelled by inclination. *See "Divorce" below.*

Widows.—The Smritis appear to provide three alternative conditions for widows, namely, (1) *Sutteeism* or cremation with the deceased husband's body ; (2) life of asceticism ; (3) re-marriage. The first has been abolished by legislation. The ascetic life is the alternative adopted by

(n) 28 C. 37; and 858; 1935 M. 616.

(o) 44 C. 971; 1929, 121.
H. L. 8

(p) 26 M.L.J. 363.

(q) 17 M. 233, 244-245.

women of respectable castes, so that amongst them remarriage of women has come to be regarded as illegal. It did accordingly become necessary to pass Hindu Widows Re-marriage Act (XV of 1856) for legalizing the remarriage of Hindu widows.

Although this Act validates the re-marriage of Hindu widows, yet it lays down that the rights which any widow may have in her husband's or his lineal successor's property, shall upon re-marriage cease, even if there be any custom of re-marriage. (*r*) But in the United Provinces and Oudh a different view has been taken and held that where there is a custom of re-marriage, a Hindu widow does not forfeit her rights to the property of her first husband. (*s*)

The Act also provides that a Hindu widow on re-marriage can be deprived of the right of guardianship of her children by her late husband. (*t*) It has also been enacted that no widow will be rendered capable of inheriting any property by reason of her re-marriage under the Act, if before the passing of the Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Hindu Women's Rights to Property Act (XVIII of 1937 and XI of 1938), enables a predeceased son's widow and the widow of a predeceased son of a predeceased son, to get a share in the estate of the father-in-law or the grandfather-in-law as the case may be. But as there is no restricting the rights of any one of these widows to the inheritance in case of remarriage either in this Act or in the Widow Remarriage Act, the estate she gets is not forfeited on remarriage.

Sec. 10—POLYGAMY AND POLYANDRY

Polygamy. —Hindu law permits a man to have more wives than one at the same time, (*u*) although it recommends monogamy as the best form of conjugal life.

(*r*) 22 C. 589; 22 B. 321 F.B.;
1 M. 226; 50 C. 727.

(*s*) 55 A. 24 F.B.; 58 A. 1034;

11 A. 330; 3 Luc. 610.
38 C. 362, 873, 875.

(*u*) Dayabhaga, Ch. IX, 17 M.
235, 239 F.B.

Polyandry —or the marriage of a woman with several men is not lawful except to some tribes where it is allowed by custom.

Sec. 11—DIVORCE

Marriage in Hindu law is regarded as an indissoluble union of the husband and the wife (*v*) extending to the next world. But though Hindu law does not contemplate divorce, yet it has been held that where it is recognized as an established custom, it would have the force of law. (*w*)

Even when her first husband is alive, a woman is allowed to remarry should she be abandoned by her first husband (*x1*) for adultery or any other cause, or he be not heard of for a certain period, or adopt a religious order, or be impotent or become outcasted.

The usage of remarriage of women during the lifetime of their first husband is found to be observed by some low castes, amongst whom the first marriage is dissolved either by a decision of the caste *Punchayet* (a congregation of the caste people), or by the husband's *Chhar Chithi* or letter of release granted to the wife, who may then contract *Sagai* or *Nika* marriage with another man. (*x2*)

In the absence of a custom to the contrary a married woman cannot contract a second marriage during her husband's lifetime. (*y*)

An apostasy or conversion to another faith, (*z*) or desertion, (*a*) does not effect the dissolution of marriage in Hindu law. But the Calcutta High Court has held that a wife who embraced Mahomedan faith and she having asked her

(*v*) 13 P.L.R. 19.

(*w*) 3 C. 305; 37 B. 295; 63 I.C. 594 (N); *See* 26 M.L.J. 260.

(*x1*) *Gopi v. Jaggo*. 63 I.A. 295.

(*x2*) 19 C. 627.

(*y*) 11 A.L.J. 711.

(*z*) 26 M.L.J. 260, 264; 2 O.L.J. 101; *see* 18. C. 264.

(*a*) 42 M.L.J. 276; 1 L. 440.

husband to do so and the latter having refused, is entitled to a decree for dissolution of her marriage. (g)

Under Section 17 of the Special Marriage Act the provisions of the Indian Divorce Act, are made applicable to the Hindus married under the Special Marriage Act.

CHAPTER IV ADOPTION

Sec. 1—GENERAL TOPICS

Sub-Sec. 1—Sons and spiritual benefit

The usage of adoption — is the survival of an archaic institution based upon the principle of slavery, whereby a man might be the subject of dominion or proprietary right. The children are absolutely under the power of the father who could give, sell or disown them.

Twelve kinds of sons—give an idea of the primitive conception of family relationship: (1) The *Aurasa* or a son begotten by a man on his own wife is what is now understood by the term son. (2) The *Kshetraja* or appointed wife's son was a son begotten on one man's wife by another man who was appointed by the husband or his kinsmen for that purpose ; the son so produced became the son of the woman's husband. (3) So also was a son whom a wife secretly brought forth by adultery ; this son called *Gudhaja* became the son of the woman's husband. (4) A son born of an unmarried daughter called *Kanina* became the son of the maternal grandfather. (5) So was the *Putrika-putra* or a son of an appointed daughter who was given in marriage to the bridegroom with the condition that the son born of her would belong to her father ; the marriage, in such a case did not operate as a transfer of dominion over the damsel, from

(g) 33 C.W.N. clxxix (Notes);
Chalimut-ness Bibi v.
Surendra, decision of

Buckland J. of Cal. H.C.
1924.

the father to the husband. (6) Similarly the child in the womb of the pregnant bride called *Sahodhaja* was transferred by marriage to the bridegroom. (7) The son of a twice-married woman called *Paunarbhava* is now deemed *Aurasa* or real legitimate son, but he is enumerated among secondary sons, as remarriage of women was disapproved by the sages. Although the Smritis purport to give the above classification of sons, it must necessarily include daughters as well.

Then come the five descriptions of sons by adoption viz., (8) the *Dattaka* and (9) the *Krita* are sons given or sold respectively by their parents to a man who takes the boy for affiliating him as a son. (10) The *Kritrima* and (11) the *Svayandatta* are the sons made and self-given, they are destitute of parents and therefore *sui juris* and free to dispose of themselves, they become the sons of the adopter with their own consent ; the difference between them being that in the case of the *Kritrima* or son made, the offer comes from the adopter, while in the case of the self-given son the offer is made by him. (12) An *Apaviddha* or deserted son is one who is abandoned or disowned by his parents and is adopted by a person as his son.

Doctrine of spiritual benefit, —seems to have been invoked for the purpose of discouraging the institution of subsidiary sons. The real legitimate son and the appointed daughter's son hold the highest position in a spiritual point of view ; to the sons by adoption is assigned a middle rank : while the sons by operation of law, owing their origin to adultery, unchastity and looseness of sexual relation, are condemned.

Sub-Sec. II—Law of adoption

Law of adoption simple.—The law of adoption, as propounded in the Smritis and explained in the commentaries respected by the different schools, is very simple. But many useless and arbitrary innovations were, for the first time,

introduced by Nanda Pandita in *Dattaka-Mimansa* his treatise on adoption.

Works on adoption.—The *Dattaka-Mimansa* (*a*) and the *Dattaka-Chandrika* are two treatises on adoption, which have come to be regarded as authority. They are respected all over India, but that when they differ, the doctrine of the *Dattaka-Chandrika* of Devnanda Bhatta is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares. (*b*)

With respect to these two treatises the Privy Council in *Sri Balusu v. Sri Balusu* (*br*) said that caution is required in accepting their glosses where they deviate from or add to the Smritis.

The object of adoption —is twofold, the one is spiritual and the other, secular: a son is necessary for the attainment of a particular region of heaven for the performance of exequial rites and for offering periodically the funeral cakes and the libations of water, as well as for the celebrity of name and for perpetuation of lineage.

Sub-Sec. III—Form of adoption

Dattaka and Kritrima,* —are the only forms of adoption which are now recognized by the Courts. Of these the *Dattaka* is said to be in force everywhere including Mithila ; and the *Kritrima* is confined to Mithila only.

Putrika Putra.**—It is most natural that a person destitute of male issue should desire to give to a grandson by daughter the position of male issue. The appointed daughter's son is not regarded by Manu as a secondary son

(*a*) *Bhagwan Singh v. Bhagwan Singh*, 26 I.A. 153.

(*b*) 20 C.W.N. 90; Collector of Madura *v. Mootro*, 12 M.I.A. 397; 26 I.A. 153; 48 I.A. 280; 54 M. 576.

(*br*) 26 I.A. 113.

* See post Sec. 9 " *Dattaka* and *Kritrima*."

** See post Sec. 9 " *Kritrima* and *Putrika Putra*."

but is deemed by him as a kind of real son. But the custom has become obsolete. (c) This form of adoption appears still to prevail in Malabar and in the North-Western Provinces, and the neighbouring districts. (d) In the Oudh Estates Act "son of a daughter treated in all respects as one's own son" and is declared to be heir, in default of male issue.

'Sahodhaja and Paunadbhava. ***—The pregnant bride's son and the twice-married woman's son are both recognised at the present day, but they are deemed as *Aurasa* or real legitimate sons and not as secondary or subsidiary sons.

Dvyamushvayana. —See post, Sec. 8.

Adoption by custom. —In the districts of old Delhi territory a person whose adoption, though prohibited by Hindu law, is valid by custom so as to invest him with all the rights of an adopted son. (e)

Sec. 2—WHO MAY ADOPT

Sub-Sec. 1.—Capacity of men

When son exists. —A man who is destitute of son should make a substitute of son which evidently discourages adoption by a man having an *Aurasa* or real legitimate son; its operation has been extended by the Privy Council in the case of *Rungama v. Atchma*, (f) holding that a man having an adopted son, cannot adopt another. Bearing in mind that in Hindu law a son's son's son holds the same position as a son, the result is that a man having a real legitimate or an adopted (g) son, grandson or great-grandson, cannot adopt. But the existence of a son in embryo at the time of adoption would not invalidate it. (h)

So also the existence of a male descendant who is, by reason of any physical, moral, or intellectual defect, excluded

(c) 58 I.C. 44; 31 M. 310; See *Jeembnath v. Court*, 2 I.A. 163 (point not actually decided).

(d) 5 O.L.J. 294; 47 I.C. 225.

*** See ante p. 61.

(e) 11 L. 481 F.B.

(f) 4 M.I.A. 1.

(g) 50 I.C. 113.

(h) 12 B. 105; 29 A. 310.

from inheritance and incapable of conferring spiritual benefit, e.g. one who has become a *Sannyasi* or whose adoption is declared invalid, is no bar to adoption. (i) For, the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit ; a child who is destitute of these capacities has not the status of a son in the eye of Hindu law.

Simultaneous adoptions. —Adoption of two sons successively was held invalid. Simultaneous adoption of two sons for two wives, has been held invalid in the case of *Surendra v. Doorga*. (j)

Wife's consent. —The husband can adopt without the consent of his wife, but the son so adopted does not become the heir to such a wife. (k)

Bachelor (l) and widower (m), —may make valid adoption. For who should be deemed the maternal grand-sires of the boy adopted, see : Sec. 6, Sub-Sec. III page 82 post.

Minor, —may adopt and give authority to his wife to adopt. (n) It is not clear from these decisions whether it is sufficient for the competency of a minor that he should attain the age of discretion or that he should attain the age of majority according to Hindu law, i.e., complete the fifteenth year. (o)

A minor in Bengal under the Court of Wards cannot validly adopt or give authority to adopt, except with the assent of the Lieutenant Governor, (now Governor) obtained either previously or subsequently (p) there are similar restric-

- (i) *Dattaka-Mimansa*, 2, 62; Adoption 2nd Ed. p. 196; Stange's H.L. Vol. 77; 23 Bom. L.R. 1320; 57 I.C. 647 (N); 54 M. 576; 62 I.A. 165.
- (j) 19 I.A. 108; 12 I.A. 198.
- (k) See Tagore Law Lectures on Adoption, pp. 214-215,
- (l) 2nd Ed.; 33 I.C. 361.
- (m) 12 B. 329; 4 M.H.C. 270.
- (n) 2 M.H.C.R. 367.
- (o) 15 W.R. 548; 3 I.A. 72.
- (p) 18 C. 69, 72. See 43 B. 481, 486.
- (q) Act IX of 1879 (B.C.) Sec. 61.

tions in Madras, (q) the Central (r) and the United Provinces (s) and the Punjab. (t)

Lunatic.—A lunatic can adopt a son during the interval of sound mind. (u)

Leper.—A leper whose disease was of such a nature as did not unfit him for performing both social and religious duties in company with others, was not disqualified from making an adoption. (v)

Special Marriage Act.—A Hindu married under the provisions of this Act forfeits his right to adopt. (w)

Sub-Sec. II.—Capacity of women

Her right to adopt.—Vasistha says: “A woman should neither give nor accept a son except with the permission of the husband.” It has been very differently construed.

Views of different schools.—In *Mithila* it is absolutely necessary that the husband should give his assent at the time of adoption; therefore a widow cannot adopt a *dattaka* son there. (x)

In *Bengal* the husband’s express assent is absolutely necessary and it is operative after his death so as to enable a widow to make a valid adoption.

The *Benares* school follows the *Bengal doctrine*. (y)

In *Madras* (z) including *Mysore*, (a) and the *Punjab* (c) a woman may adopt either with the *husband’s assent* or with his *kinsmen’s assent* if he died without giving any.

(q) Act I of 1902 (M.C.) Sec. 34.	(v) 29 C.W.N. 129 P.C. 48 B. 363.
(r) Act XXIV of 1899 (C.P.C.) Sec. 32.	(w) Section 25.
(s) Act III of 1899 (U.P.C.) Sec. 34.	(x) 12 A. 328 F.B.
(t) Act II of 1903 (P.C.) Sec. 15.	(y) Bishwa v. Jugal, 50 I.A. 179.
(u) 19 M.L.T. 243.	(z) See pp. 70-72 post.
	(a) 2 Mys. L.J. 157.
	(c) 27 I.C. 701.

In *Bombay* (*d*) a widow may also adopt of her own accord without any assent of either the *husband* or his *kinsmen* or of his surviving *co-parceners*.

A *Jaina* widow also can adopt of her own accord without any authority from either the husband or his kinsmen. (*e*) But the Jains living within a place governed by the Madras school, in the absence of special custom to the contrary, which is to be proved by him who alleges it, are governed by that school of Hindu law and hence a widow can adopt only with the permission of her husband or sapindas. (*f*)

The widows of *Marawaris* of Bikanir can adopt without the consent of the kinsmen. (*g*)

Nature of women's right—is, that she has no right to adopt herself, (*h*) but that she is deemed to act merely as an agent, delegate or representative of her husband, or that she is only an instrument through whom the husband is supposed to act. (*i*) It should, however, be observed that the wife is the only agent to whom authority for adoption may be delegated; a man cannot authorize any other person to adopt a son for him. (*j*) A widow is bound by the act of her husband in making an adoption and she must adopt according to all the implications of an adoption by him, valid or invalid. (*k*)

Power how constructed.—The widow's right of adoption depends entirely on the power and it must be strictly pursued, i.e., be subject to the restrictions and limitations that the husband may choose to impose in that behalf. (*l*)

Preferential right among widows.—If a person has more wives than one, and authorises one of them, she alone is

(*d*) See p. 71; 60 I.A. 49; 57 B. 157 P.C.

(*e*) 58 A. 1019; 14 L. 78; 17 C. 518; 56 I.C. 65 (Nag.)

(*f*) 16 M. 182; 1927 M. 228 N.I.

(*g*) 27 C.L.J. 517.

(*h*) Puttu Lal v. Parbati, 42 I.A. 155.

(*i*) Collector of Madura, 12

M.I.A. 435; Puttu v. Parbati, 42 I.A. 155.

(*j*) 29 M. 437; 444.

(*k*) 24 Bom. L.R. 489.

(*l*) Mustaddi v. Kundan, 33 I.A. 55; Surendra v. Durga

19 I.A. 108, 122; Kalawati Dharan, 55 A. 78, 82,

P.C.; 33 I.A. 145.

entitled to adopt. If any other particular direction is laid down, that must be followed ; should a general authority to all the wives be given, then there might be some difficulty in case of disagreement and dispute, as only one of them shall be entitled to adopt. (m) The senior widow has the preferential right to adopt, (n) even without the consent of the junior widow, (o) but not *vice versa*. When joint authority is given to his two widows, both of them may jointly adopt a son, but in that case the senior widow shall be the mother of the boy and her co-widow shall be the boy's step-mother. (p) The Judicial Committee has held that power given to more than one wife jointly cannot be validly exercised by one on the death of the other co-widow. (q) But when permission is given to the widows severally, the younger widow, on the refusal of the elder widow, can adopt. (r) But if one is willing to loyally carry out the husband's wishes by adoption and the others are opposed for selfishness, then the former may adopt by giving notice to the latter. (s) But they all may agree in ignoring the authority.

Widow may not adopt though enjoined. —However solemnly a husband may enjoin his wife to adopt a son unto him she is not legally bound to fulfil his dying request ; her rights to the husband's estate are not in the least affected by her omission or refusal to adopt. (t)

Authority in excess of donor's power. —An authority is void if it directs adoption under circumstances in which the man himself, if living, could not have adopted.

(m) See Narsimha *v.* Parthasarathy, 41 I.A. 51.

(n) 39 C. 582; 39 M. 772; 43 B. 481.

(o) 5 Bom. H.C. 181.

(p) 57 B.I.; 52 M. 373.

(q) Narasinha *v.* Parthasarathy, 41 I.A. 51.

(r) 50 I.C. 599 (N).

(s) 18 C. 69.

(t) 7 C. 288.

(t) 7 C. 288; 1926 A. 194; I.L.R. (1938) M. 621.

Power given to widow and others.—A joint power to the widow and other person or persons (*u*) or to the testator's widow conjointly with his executors and trustees is invalid. (*v*) But the choice of the boy for adoption may be restricted by the husband requiring the consent of persons named by him. (*w*) In such cases the consent of the majority will be sufficient. (*x*) Where an authority was given to the testator's widow to be exercised "with the permission" of the testator's father, an adoption made after the death of the father of the testator without obtaining his permission, is invalid. (*y*)

Power how given. —An authority may be given either verbally or by a Will or by a writing (*z*) called *Anumati-patra* which must now be engrossed on a stamp paper and must also be registered. (*a*)

Power incapable of execution. —When a widow is authorized to adopt in the event of the death of an existing son and the son dies and the estate vests in the son's widow or any heir, other than the first-named widow, then the first-named widow cannot adopt. (*b*) Even an adoption by the father's widow with the consent of the son's widow in whom the estate vested after son's death, is invalid. (*c*)

The Privy Council and Courts in India construed the decision of the Privy Council in *Bhoobun Moyee's* case, to mean that the power is absolutely extinguished by the vesting of the estate in the son's widow and cannot revive on the estate reverting to the widow after the death of the daughter-in-law.

The Privy Council (*d*) has stated: "Unless there is a time limit imposed in the authority which empowers her to

(<i>u</i>) Adoption, 2nd Edn. p. 233 <i>See Narasimha v. Parthasarathy</i> , 41 I.A. 51.	P. 187. P.C. (<i>z</i>) 33 I.A. 55; 27 M. 30; 55 I.C. 38 N.
(<i>v</i>) Amrita <i>v.</i> Surnomoyee, 27 I.A. 128.	(<i>a</i>) 48 I.A. 480.
(<i>w</i>) <i>Ibid</i> ; 41 C.L.J. 55.	(<i>b</i>) <i>Bhoobunmoyee v. Ramkishore</i> , 10 M.I.A. 279.
(<i>x</i>) <i>See Bal Gangadhar Tilak v. Sriniwas</i> , 42 I.A. 135.	(<i>c</i>) 55 B. 699.
(<i>y</i>) <i>Rajendra v. Gopal</i> 10	(<i>d</i>) <i>Pratap Singh v. Thakur</i> , 46 I.A. 97.

adopt or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. The circumstances under which her power becomes extinguished are clearly pointed out by their Lordships in *Bhoobun Moyee's* case (*e*) and *** in *Madan Mohan's* case." (*f*)

Latest Privy Council—decision in *Amarendra v. Sanatan* (*g*) has laid down the following important principles :—

(1) The validity of adoption is to be determined by spiritual rather than temporal considerations and the consequent devolution of property is a mere accessory to it.

(2) The power of adoption in a mother was extinguished when her son had died leaving a son or a widow to whom the son's estate passed by inheritance.

(3) The vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another co-parcener of the joint family, or an outsider claiming by reverter, or by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption.

(4) There is no foundation that the mother's authority to adopt is extinguished by the mere fact that her son has attained ceremonial competence.

There is no limit of time—for the exercise by the widow in whom her husband's estate is vested, of the power of adoption ; she may adopt at any time she pleases, when the estate is vested in her. (*h*)

When widow cannot adopt. —As a widow adopts a son unto her husband in her capacity of being his surviving half, she cannot adopt after re-marriage, nor when she is pregnant in adultery. A widow cannot adopt when a son previously adopted by the husband is alive. (*i*)

(*e*) 10 M.I.A. 279.

I.A. 55; 46 I.A. 97; 63 C.

(*f*) 45 I.A. 156.

358.

(*g*) 12 P. 642.

(*h*) *Mutsaddi v. Kundon* 33

(*i*) 23 Bom. L.R. 1272.

Hindu Women's Rights to Property Act (1937),—enables a widow, a predeceased son's widow and a widow of a predeceased son of a predeceased son to get a share in the estate of a deceased Hindu. If a Hindu leaves behind him a widow and a predeceased son's widow and his separate estate and if both the widows are entitled to adopt, the adoption made by the widow will not debar the predeceased son's widow from adopting a son unto her husband for his spiritual benefit. But if the son's widow adopts first, the widow (*i.e.* the mother-in-law) cannot adopt, inasmuch as, this adopted son would be competent to offer spiritual benefit to the father and grandfather both.

Adoption by infant widow.—As an adoption by the widow divests her of her husband's estate, therefore in an adoption by a young widow, the Court will expect clear evidence that at the time she adopted, she was informed of her rights and of the effect of the act of adoption. (*j*) A minor girl of fifteen can make a valid adoption; (*k*) but a widow of twelve years of age (*l*) cannot, nor can a girl who has not attained sufficient maturity of understanding make a valid adoption.

Sub-Sec. iii—Kinsmen's assent

Adoption by kinsmen's assent in Madras.—In the Dravida or the Madras School, a widow may, in the absence of prohibition, (*m*) adopt with the assent of her deceased husband's kinsmen, (*n*) *i.e.*, sapindas. (*n1*) Where adoption may be made by the widow with the assent of kinsmen, there, if the husband was a member of an undivided family, the assent must be sought from the surviving male members of the family. (*o*) In such a case the assent of the senior and

(*j*) 6 B. 524; 13 M. 214.

C.W.N. 1 P.C; 45 I.A.

(*k*) 43 B. 481.

265; 47 I.A. 99: *but see*

(*l*) 46 B. 307.

41 I.A. 5.

(*m*) 51 M. 893.

(*n1*) 65 I.A. 93.

(*n*) Krishnaya *v.* Surya, 40

(*o*) Venkamma *v.* Subrahama-

niam, 34 I.A. 22.

managing member may be sufficient, (*p*) but not of the divided kinsman. (*q*) The assent of the majority is sufficient in the absence of improper consideration. (*r*) The proper person to give the requisite assent is he, under whose guardianship the woman should remain according to the circumstances in each case. (*s*) If the husband was separate, the widow must *bona fide* apply (*t*) for the assent of the nearest *Sapindas*, i.e., the consent of the presumptive reversionary heirs must be taken. (*u*) But a nearest *Sapinda*-who is a minor, or a lunatic, or who is living in a distant country, or is clearly proved to be actuated by corrupt, selfish or malicious motives, may be disregarded. (*v*) Where there is no *Sapinda*, the widow can adopt without assent. (*w*).

The assent to be given after the exercise of discretion but not in exchange for valuable consideration, (*w*) or from any corrupt motive, (*x*) nor procured by mis-representation. In giving or refusing his consent a *Sapinda* must act with the consideration of what is for the benefit of the family and not upon personal grounds. (*y*)

But an assent validity given cannot be arbitrarily withdrawn, (*z*) but it can be revoked for a reasonable cause. (*a*)

Adoption without assent in Bombay. —In Bombay a widow in whom her husband's property is vested, may adopt without any authority from her husband or assent of his kinsmen, in the absence of express prohibition (*b*) or direction (*c*) by her deceased husband, provided she does not act capriciously or from any corrupt motive.

But the Privy Council has now held that in Bombay

(<i>p</i>) 28 M.L.J. 363.	77, 43 M. 650 P.C.
(<i>q</i>) <i>Virada v. Brojo</i> , 3 I.A. 154; 34 I.A. 22.	(<i>v1</i>) 1933 R. 334.
(<i>r</i>) 41 M. 998, 100 P.C.; 47 I.A. 99.	(<i>w</i>) 36 M. 19.
(<i>s</i>) 41 M. 998, 1009 P.C.; 12 M.I.A. 397; 55 I.C. 38 (N).	(<i>x</i>) 34 I.A. 22 <i>Viswasundara v. Somasundara</i> , 43 M. 876.
(<i>t</i>) 48 I.C. 222.	(<i>y</i>) 51 M. 893.
(<i>u</i>) 34 I.A. 22; 43 M. 650 P.C.	(<i>z</i>) 41 M. 604.
(<i>v</i>) 43 M. 650, 654 P.C. 39 M.	(<i>a</i>) 41 M. 604, 610.
	(<i>b</i>) 6 B. 498 F.B.; 35 B. 169.
	(<i>c</i>) 47 I.A. 202.

Presidency a widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, no matter, whether her husband at the time of his death was joint or separate and whether his property was or was not vested in her as an heir at the time when she made the adoption. (d)

Sec. 3--WHO MAY GIVE IN ADOPTION

Father and mother.—The father and mother only of a boy are competent to give him away in adoption. (e) The concurrence of both would be desirable. But the father may act even against the will of the mother. The mother, however, cannot give without the assent of her husband while he is alive ; but after his death she can give her son in adoption, in the absence of express prohibition by her husband. (f)

Gift by widow.—But a widow has no power, after re-marriage, to give in adoption her son by her first husband ; the right to give a boy in adoption is lost by re-marriage ; (g) but where the husband authorized his widow to give their son in adoption, the widow can make a valid gift in adoption even after her re-marriage. (h)

As regards the gift of an only son, the Judicial Committee approved the view that the wife's power, at least with the concurrence of Sapindas in cases when that is required, is co-extensive with that of the husband, (i) i.e., she, can give away in adoption an only son.

No relation except parents.—The law confers on the parent only, the power of making a gift in adoption. (j) A stepmother, or any other relation, cannot make such a gift.

(d) *Yadao v. Namdeo*, 48 I.A. 513 see also *Amarendra v. Sanatan*, 60 I.A. 513; 40 C.W.N. 1125 P.C.

(e) *Dhanraj v. Soni Bai*, 52 I.A. 231, 37 B. 513.

(f) 30 C. 965; 1 Bom. L.R.

144. (g) 24 B. 89.; 20 N.L.R. 57; 1925 N. 1 F.B.

(h) 33 B. 107. (i) *Sri Balusu v. Sri Balusu*, 26 I.A. 113.

(j) *Dhanraj v. Sonibai*, I.A. 231.

Delegation of powers.—The parents cannot delegate this power to any other person.

Gift by convert.—The power of the father to give away his son in adoption is not lost to a Hindu convert to Islamism.

Consideration for giving.—Though the parents have the power to give the boy in adoption, yet an agreement to pay an annuity in consideration of giving the boy in adoption is invalid and unenforceable. (k)

Sec. 4—WHO MAY BE GIVEN AND TAKEN IN

Sub-Sec. I.—Quality of sons to be taken

Only son.—Vasistha forbids the adoption of an only son. This rule is merely recommendatory in character and the Judicial Committee has held the adoption of an only son to be valid. (l)

Joint adoption of the same boy.—The adoption by two brothers (m) or by two widows even of two brothers, (n) of the same boy either at the same time or at different times, is invalid.

Orphan.—The law confers on the parents only the power of making a gift in adoption without which no adoption can be valid. (o) So it has been held that an orphan cannot be taken in adoption. (p) The principle of *factum valet* does not apply even if an adoption, as a matter of fact, has taken place. (q)

The adoption among Jains has no spiritual or religious significance ; and hence, an adoption of an orphan is valid by custom among them. (r) So adoption of orphans is

(k) 24 Bom. L.R. 41.

(l) 26 I.A. 113.

(m) 52 I.A. 231.

(n) 27 P.W.R. 1915.

(o) 52 I.A. 231.

(p) *Ibid.* 37 B. 513; 37 M.

529;

48 I.A.

252.

(q) 44 M. 260; 15 C.L.J. 97.

(r) 45 B. 754.

customary among the Dhusars of Gurgaon, (*s*) and Jats of Ballabgarh districts. (*t*)

Some other rules held admonitory.—The rule that a man should adopt his brother's son if available in default of him a *Sapinda*, in his default a *Samanodaka*, and in his default he should take one belonging to a different *Gotra* or family, is merely recommendatory. (*u*)

Sub-Sec. II—Prohibited relation

Prohibition for adoption by twice-born classes.—According to Nanda Pandit a brother or an uncle, or the son of a daughter, or of a sister, or of the mother's sister, or the like, should not be adopted by a twice-born person ; he further drew inferences from the words “ bearing the reflection of a son ” that a boy should be adopted as could be begotten by the adopter on the boy's mother by appointment to raise issue in the *Kshetraja* (*v*) form. Sutherland the learned translator of *Dattaka-mimansa* and *Dattaka-chandrika* formulates the above rule thus : A twice-born man cannot adopt a boy when the relationship between the boy's mother and the adopter is such that there could have been no valid marriage between the adopter and the boy's mother, had she been unmarried.

Nanda Pandit's rule as taken by courts, —is not uniform :

In the *Punjab* the prohibition is not followed. (*w*) Adoption of a daughter's son among regenerate caste is invalid (*x*) in the absence of custom. (*y*) But it is allowed among people of some districts. (*z*)

In *Bombay* the marriage rule is confined to three cases, viz., daughter's son, sister's son and mother's sister's son

(*s*) 48 I.C. 405.

(*w*) 36 I.A. 103.

(*t*) 1929 A. 561.

(*x*) 13 L. 126; 2 L. 69.

(*u*) 5 I.A. 40.

(*y*) 19 L. 173.

(*v*) See ante p. 60.

(*z*) 21 O.C. 276; 1933 L. 1050;

16 L. 1007; 9 L. 1.

in an adoption by a regenerate caste. (a) But by custom adoption of some of these relations are valid. (b)

In the *Central Provinces* the Bombay rule is followed. (c)

In the *North-West Provinces* the marriage rule is practically followed except in cases allowed by custom. (d)

In *Mithila* the marriage rule is not respected when adopting in the *Kritrima* form. (e)

In *Patna* High Court the adoption among the regenerate castes of daughter's, sister's or mother's sister's son is invalid. (f)

In *Bengal* the marriage rule is followed in the case of regenerate castes. (g)

In *Madras* the marriage rule is followed. (h)

In *Oudh* also the marriage rule is followed. (i)

In the case of *Sudras* there is no such restriction as in the case of the regenerate classes.

Sub-Sec. III—Caste of the boy

The adoption of a boy belonging to a caste different from that of the adopter is not forbidden by the Smritis. The caste exclusiveness has become so rigid now that an adoption of a son known to belong to a different caste, is impossible at the present day; except among different sub-division of *Sudras*.

Sub-Sec. iv—Age and initiatory ceremonies

Smritis do not limit.—Neither in the Smritis nor in the commentaries on general law is there any restriction

(a) 32 B. 619; 34 B. 491; 36 B. 533.

(b) 56 B. 298; I.L.R. (1938) B. 398.

(c) 9 N.L.R. 130; 7 N.L.R. 82.

(d) 26 I.A. 153; see 14 A. 53.

(e) See Sec. 9 below.

(f) 6 P. 506.

(g) I.L.R. (1937) 2 C. 265.

(h) 3 M. 15; 11 M. 49; 43 M. 867.

(i) So referred in I.L.R. (1937) 2 C. 265.

either as to the age of, or as to the performance of any initiatory ceremony upon a person which limits his capacity for being adopted. But *Dattaka-mimansa* and *Dattaka-chandrika* laid down some restrictions.

Case law. —The Courts have laid down that a twice-born boy may be adopted if the ceremony of the investiture with the sacred thread has not actually been performed upon him, and a *Sudra* before his marriage. (j)

The performance of the *Upanayana* ceremony of the boy is an absolute bar to the adoption in the Benares school ; (k) but among Kashmiri Brahmins domiciled in the Punjab is held valid by custom. (l) In Madras, according to custom amongst the Brahmanas, the adoption of a boy of the same *Gotra* after *Upanayana* or investiture with the sacred cord, is valid. (m)

The Bombay High Court has held that the fact that an adopted son is older than the adopting mother does not invalidate adoption ; (n) and he may be older than the adoptive father. (o)

In the Punjab a married boy cannot be validly adopted among any class of Hindus. (p) The same view is observed in the Benares (q) and the Madras schools ; (r) but in Bombay a married man with children may be adopted. (s) In the absence of any proof of custom, a married Marwari Brahmin cannot be validly adopted. (t) Amongst the Jains there is no restriction of age or marriage of the boy. (u)

An adoption of an infant in arms is not illegal, (v) and that amongst the Agarwallas the age of the boy for adoption extends even to thirty-two years. (w)

(j) 9 A. 253, 328; 35 A. 263;
2 P. 469; see 32 A. 247

P.C. 5 P. 777.

(k) 1927 A. 634.

(l) 29 C.W.N. 106 P.C.

(m) 9 M. 148 F.B.; 1934 M. 48.

(n) 23 B. 250.

(o) 48 B. 387.

(p) 61 I.C. 763.

(q) 44 I.C. 928 (N).

(r) 53 M. 267; 1936 P.C. 18.

(s) 10 B. 80; See 49 B. 520;

62 I.A. 165.

(t) 1929 A. 739.

(u) 30 A. 197; 37 I.A. 93.

(v) See 56 I.C. 97 (C).

(w) 52 I.A. 231.

Sec. 5—NECESSARY CEREMONIES

Giving and taking.—The ceremonies of *giving* and *taking* are absolutely necessary in all cases ; and must be accompanied by the *actual delivery of the child* ; symbolical or constructive delivery by the mere parole expression of intention on the part of the giver and the taker, without the presence of the boy is not sufficient. (x) Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, nor acknowledgment, sufficient by themselves to constitute legal adoption, in the absence of actual *gift* and *acceptance* accompanied by *actual delivery* ; (y) a formal ceremony being essential for that purpose. (z)

Homa.—In *Sudra* adoption no other ceremony is necessary, *giving* and *taking* being sufficient ; and *Homa* is not necessary ; (a) it used to be, and still is, oftener than not, performed by them vicariously through their priests. In the Punjab no specific ceremonies or formalities nor *Datta Homa* is necessary here, but there must be the ceremony of *gift* and *acceptance*. (b) Among the *Jains* the giving and taking are essential but the religious ceremonies are not necessary. (c) Among The *Agarwalla Benias* of the Punjab an unequivocal declaration of adoption followed by treatment of that boy as an adopted son is sufficient evidence of a valid adoption. (d) Adoption with the *Agarwallas* is a mere temporal arrangement. (e)

With respect to the three regenerate tribes the ceremony of *Datta Homa* or burnt offering is said to be necessary *in addition to giving and taking*. (f)

But *Homa* is not necessary among twice-born classes

(x) 2 Indian Jurist, N.S. 22.

(b) 3 I.A. 17; 20 I.C. 303; 1930

(y) I.A. Sup. 149; 25 C.W.N. 403; 6 P. 506; 11 L. 503.

L. 1915.

(z) 58 I.A. 148.

(c) 56 I.C. 81 (Nag.); 43 I.C.

318.

(a) 31 I.C. 855; 20 C.W.N. 901; 50 I.C. 599 (Nag); 7 I.A. 24.

(d) 40 I.A. 156.

(e) 52 I.A. 231.

(f) 49 B. 515.

when both the adopter and the adoptee belong to the same *Cotra*. (g)

The widows, like *Sudras*, can perform the *Homa* rite vicariously through the sacerdotal priests.

During impurity.—Pollution on account of death or birth of a relation does not vitiate an adoption made during it ; gift and acceptance may be performed by a person under it, while the religious ceremony may be delegated to a priest or a relation free from impurity. (h)

Sec. 6—STATUS AND RIGHTS

Sub-Sec. I.—Status after adoption

In natural family.—Except for the purpose of prohibited degrees in marriage, the connection of the adopted son with his relations by birth becomes extinguished unless they be also his relations by adoption, as in the case of the adopter and the adoptee being related before adoption. In such cases, however, the original relationship cease, and a new relationship based on adoption arises as far as possible between the adoptee and the original relations, through the adoptive parents.

The consanguinal *Sapinda* relationship in the family of his birth continues even after adoption, and in consequence an adopted son cannot marry a damsel belonging to that family who is within the degree of *Sapinda* relationship.

Absolute adoption is civil death and new birth.—An absolute adoption appears to operate as birth of the boy in the family of adoption and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption. He is deemed to be begotten by the adoptive father on his own wife who is the adoptive

(g) *Bal Gangadhar Tilak v. Shrinivas*, 42 I.A. 135. | (h) 20 C.W.N. 901; 49 I.C. 215; 22 B. 520; 27 M. 538.

mother. His status as son of his real parents ceases in the same way as if he were dead at the time of adoption.

The boy cannot take away with him the natural father's *Gotra* and *Rikha*, when he is passing from the family of his birth to that of adoption, or more properly speaking, when he becomes divested by adoption of the status of being the son of his progenitor and is invested with the status of being the son of the adopter, *i.e.*, he acquires the status of sonship to the adoptive parents and as such becomes a member of the adopter's *gotra*, becomes a coparcener of his family estate, and is invested with the capacity for offering *Pinda* to him and his ancestors.

Adoption operates as civil death as if the adopted person as son of his natural parents becomes dead and at the same time operates as new birth, as if he becomes again born as son of the adoptive parents ; and it was so held by the Calcutta High Court. (*i*)

But the Madras High Court (*j*) refused to accept the doctrine that an adoption operates as civil death and, hence, property already vested is not divested by his subsequent adoption to another family.

According to the Calcutta, (*k*) Lahore (*l*) and Nagpur (*m*) Courts, the adopted son does not lose the property vested in him before adoption.

The Bombay, (*n*) Allahabad, (*o*) and perhaps the Oudh (*p*) Courts hold that on adoption the adopted son is divested of the property vested in him before adoption.

The Privy Council holds that " the theory of an adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his

(*i*) 1 C.L.J. 388.

(*j*) 29 M. 437 affirmed by P.C. 41 I.A. 51.

(*k*) Shyama v. Sricharan, 56 C. 1135; but see 1 C.L.J. 388.

(*l*) 1930 L. 470.

(*m*) 1927 N. 177.

(*n*) 49 B. 520; 56 B. 619; see 62 I.A. 165.

(*o*) 1936 A. 77; 37 A. 7.
(*p*) 1926 O. 449.

complete substitution into the adopter's family as if he were born in it." (q)

Though in some parts of India the adoption of married man with son is sanctioned, still by such adoption the adopted son's son born before adoption, does not forfeit, like his father, his rights and *Gotra* acquired in the family to which his father was born, nor acquire new rights or *Gotra* in the family to which his father is adopted ; but a son, in the mother's womb at the time of his father's adoption, is born into his father's adoptive family. (r)

Guardian of adopted son.—The natural father is not the natural guardian, (s) but he is held to be the most suitable person to represent the minor adopted son's interest as next friend in a suit to assert the adopted son's rights against rival claimants, (t) as also for partition against adoptive father when the latter took a persistent hostile attitude against the minor adopted son. (u)

Sub-Sec. II—Status in adoptive family

Adopted son cannot renounce status by adoption.—The boy who is validly given away in adoption by his parents has no choice in the matter: he cannot renounce the status as adopted son ; he cannot question the power of his parents to cause the severance of his connection with his natural relations ; he may give up his right of inheritance from the adopter, but he cannot give up his status as adopted son and return to his family of birth. (v)

Cancelling adoption.—An adoption cannot be cancelled by the adopter. (w)

Status and inheritance in the adoptive family.—The adopted son holds in all respects the same position as an

(q) 43 I.A. 56.

1285.

(r) 1926 A. 425, 42 B. 547.

(u) 1927 A. 60.

(s) 1933 M. 710.

(v) 57 C. 1322; 19 B. 239.

(t) 49 M.L.J. 549; 1925 M.

(w) 40 C.W.N. 1320.

Aurasa son of the adoptive father and the adoptive mother and is entitled to all the rights of a real son of the adoptive parents, (x) with the exception of only such as has been expressly denied him. (y) An adopted son is the continuator of his adoptive father's line exactly as an *Aurasa* son, and an adoption, so far as the continuity of the line is concerned, *has a retrospective effect*. (z)

The result is, that he will inherit from the adoptive father, the adoptive mother (a) and all their relations without any distinction or restriction, subject only to the exceptions mentioned below: (b) the adopted son of a full brother will take in preference to the *Aurasa* son of a half brother and one daughter's adopted son will inherit equally with another daughter's real son. (c) But when the adoption is not in the *Dattaka* form, he cannot inherit collaterally in the family of his adoption. (d)

An adopted son, after the birth of a natural son, cannot perform the *Adya* or the first *Shraddha*, the twelve monthly *Shraddhas* which follow, six monthly and the anniversary *Shraddha* and the *Sapindikarana*. But he can perform all the other *Shraddhas* like the natural son. (e) The shares of the adopted son and subsequently born natural son are not the same in all cases. Sec. 6, Sub-sec. v. below.

Sub-Sec. III—Adoptive mother

If the adopter has more wives—than one, then the question may arise as to which of them will be the mother of the adopted son. If the adopter allows any one of his wives to join him in the ceremony of taking the boy in adoption, in that case she will be his adoptive mother and

(x) 23 M.L.J. 79; 46 B. 541.

(y) 43 I.A. 56; 40 B. 270; 46 I.A. 97.

(z) 46 I.A. 97.

(a) 3 W.R. 49.
H. L. 11

(b) 14 L. 78.

(c) 8 C. 308; 10 C. 232 P.C.

(d) 1 L. 583; 10 I.C. 822.

(e) 20 C.W.N. 201, (P.C.)

in 24 C.W.N. 794.)

her co-wives his step-mother, (f) so that the adopting mother would succeed to him to the exclusion of the other wives of the adoptive father. (g) A difficulty arises if the adopter alone takes the boy, or when all his wives join with him, if the latter course be possible. In either case all the wives might be taken to be his adoptive mothers. But the Privy Council has explained the law thus: " Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be contrary to settled law and would produce inextricable confusion in the law of inheritance." (h) Hence, 'adoptive mother' must be taken in its primary meaning of adopting mother and not in the figurative sense of the adopter's wife.

If a widower or bachelor adopts. —A greater difficulty presents itself when a widower or bachelor adopts. In the first case the deceased wife of the adopter will be the adoptive mother and her relations, the maternal relations of the adopted son ; the latter can, therefore, inherit the property of the relations of the predeceased wife of the adopter who was a widower at the time of adoption. (i) The difficulty in the latter case, however, must remain unsolved.

Sub-Sec. iv—Ante-adoption agreement

Such agreement how far binding. —A widow is not legally bound to execute the power of adoption however

(f) 23 C.W.N. 1038; 69 M.L. (h) 41 I.A. 51, 69.
J. 632.

(g) 26 I.A. 246. (i) 56 M. 759 F.B.

solemnly she might be enjoined by the husband ; but her interest in the husband's estate is not affected by her omission to adopt. Her interest, therefore, is opposed to her duty to carry out the husband's wishes ; so these are sought to be reconciled by an agreement before adoption, between the widow and the natural father of the boy, whereby the widow retained some interest in the husband's estate for her life. On this question the Privy Council (j) has held "that the consent of the natural father shows that it is for the advantage of the boy, and that mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son." And "as soon, however as the arrangements go beyond that, i.e., either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of Hindu law." Their Lordships further added that they "are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid."

From a consideration of the decisions of the Calcutta, (k) Madras (l) and Bombay (m) High Courts after the decision of the Privy Council, it seems that an agreement between the adoptive father or mother and the natural father or mother of the adopted son, by which the latter's rights are either wholly or partially postponed after the death of the adoptive mother or are curtailed by reasonable conditions, is binding on the adopted son ; provided the agreement was for the benefit of the boy.

(j) 54 I.A. 248.

(k) 63 C. 755; 27 C.L.J. 274.

(l) 52 M. 128; 55 M. 408.

(m) 1938 B. 336; 58 B. 234;

56 B. 395.

Nature of this right. —The rights thus reserved for the adopted son is a vested interest and is transferable ; (n) but after the Hindu Women's Rights to Property Act (1937) came into operation, the adoptive mother's rights to a moiety share remains unaffected as a *widow's estate*, and the son cannot transfer it.

Conditional gift and gift for valuable consideration.—

The gift of a son in adoption for valuable consideration or for an agreement executed by the adopter stipulating that the natural father is to get a maintenance allowance out of the adopter's property does not seem to be objectionable. A gift of a child in return for any benefit does not invalidate the adoption. (o)

Sub-Sec. v—Share of adopted son

Adopted and after-born sons. —When a real son becomes subsequently born to the adoptive father, there are express texts giving to the adopted son a lesser share in that event. The expressions one-third and one-fourth shares appear to be used as having reference to the share of the *Aurasa* son.

It has been held by the Privy Council (p) and Bombay (q), Madras (r) and Calcutta (s) High Courts that he is entitled to a fifth share instead of a fourth share, in other words, to one-fourth of what a legitimate son gets.

Calculation. —The quarter share to which a maiden sister is entitled on partition is thus explained in the Mita-kshara: (t) at first allot to each of the maiden sisters a share equal to that of a brother and a wife of the father, if any, and then assign one-fourth of such a share to each of the maiden sisters, and then distribute the residue equally

(n) 40 A. 692; 56 B. 164.

(o) 29 M. 161; 5 O.L.J. 294.

(p) 43 I.A. 56.

(q) 49 B. 672; 17 B. 100.

(r) 40 M. 632; 43 M. 398.

(s) 1 C.L.J. 388.

(t) Ch. I, Sec. vii, paras, 5-7.

among the brothers and the mother and step-mother, if any. If the Dattaka son's one-third or one-fourth share be explained in this way, then he is to get $1/6$ or $1/8$, if only one son be born after adoption and $1/9$ or $1/12$ if two sons be born.

Share among Sudras. —Another rule enunciated by the *Dattaka-chandrika*, is that a *Sudra's* adopted son should share equally with his begotten son. In *Arumilli Perrazu v. Subbarayadu* (*t1*) it has been settled by the Privy Council that an adopted son shares equally on partition with an after-born natural son of a *Sudra*.

Sub-Sec. vi—Adoptee's right against adopter

Under Mitakshara. —The position of an adopted son is secure under the Mitakshara. So his rights cannot be affected by an attempted alienation so far as the ancestral property is concerned.

Under Dayabhaga. —But if his position be not better than that of a real legitimate son, then under the Dayabhaga, and also under the Mitakshara so far as regards the self-acquired property, the adopted son would be left completely at the mercy of the adoptive father.

Protection needed by adopted son. —The natural parents would not have parted with their son if they had believed that the adopter could disinherit him according to his pleasure: had they thought such disinherison possible they would have required the adopter to settle his property on the boy before making the gift. But this course has now become absolutely necessary, inasmuch as, the Privy Council has held that in adoption there is no implied contract with the natural father that in consideration of the gift of his son, the adopter will not deprive the adopted son of his estate. (*u*)

(*t1*) 48 I.A. 280.

(*u*) 26 I.A. 83.

Sub-Sec. vii—Adoption by widow and divesting

When a person dies giving an authority to this widow to adopt a son unto him, then his estate must vest in the nearest heir living at the time of his death ; for a Hindu's estate cannot remain in abeyance for a nearer heir who may come into existence in future. Hence, arises the vexed question as to what estates, already vested in other persons, may a subsequently adopted son take by divesting them, the ordinary rule of Hindu law being that an estate once vested by inheritance cannot be divested by reason of any subsequent disqualification of the heir (*v*) or by reason of a nearer heir coming into existence afterwards. (*w*) Hence, divesting by adoption is an exceptional rule founded on the peculiar character of the institution.

Adopting widow.—When the estate is vested in the adopting widow as heiress of her deceased husband, she becomes divested by the adoption. If the husband's estate is vested in two co-widows, and one of them or both of them jointly adopt a son both the widows become divested. (*x*)

Hindu Widow's Rights to Property Act. (1937),—gives the widow, a predeceased son's widow and the widow of a predeceased son of a predeceased son shares in the estate of the deceased ; hence, the respective shares of these widows which they would have got by partition with the adopted son had he been a natural born son, will not be divested.

Who else divested.—When on the existing son's death the estate vested in his widow or in his paternal grandmother or other heir, it has been held that his mother in the former case, and his stepmother in the latter, could not adopt, and cause the estate to be divested. (*y*) The Privy

(*v*) 5 C. 776.

(*w*) 11 W.R.O.C. 11.

(*x*) 18 C. 69; 52 M. 373; 1924 N. 319.

(*y*) Bhoobunmoyee v. Ram-

kisore, 10 M.I.A. 279; 28

B. 461; 33 C. 1306; 33 M. 228; 38 M. 1105.

Council in *Amrendra Mansingh's* case has practically overruled the aforesaid decisions and held that except the son's widow all other heirs are divested. (z)

Any other person.—As regards the estate of any person other than the adoptive father, succession to which had opened before adoption, the adopted son cannot lay any claim to the same, (a) even when the adoption was delayed by the fraud of the person in whom the succession vested. (b)

Sub-Sec. viii—Unauthorized alienation by widow

As an adopted son becomes entitled to the adoptive father's estate by divesting the widow, he acquires from the time of adoption, (c) the right to recover any property that has been alienated by the widow without legal necessity. He is not to wait until the widow's death, like the reversioner, for the widow's estate comes to an end immediately on adoption. (d)

If under the Hindu Women's Rights to Property Act (1937), the widow is not divested of the entire estate by adoption, the adopted son could, therefore, get the alienation set aside to the extent to which his share is affected by the alienation.

Sub-Sec. ix—Invalid adoption

Effect.—A person whose adoption is invalid is in the eye of law an absolute stranger to the adoptive family, (e) and his status in the natural family remains unaffected. (f) An *Upanayana* ceremony performed by the adoptive father in an invalid adoption, is a nullity and there is no bar to his subsequent adoption. (g)

(z) See ante p. 69; 60 I.A. 25.

(a) 2 C. 295.

(b) 12 C. 18.

(c) 49 B. 604.

(d) 1 C.L.J. 319 P.C.; 32 I.A. 80

(e) 40 I.A. 213.

(f) I.L.R. (1937) 2 C. 265.

(g) 43 M. 876.

Ratification of invalid adoption—cannot turn an invalid adoption valid. (h)

Invalid adoption and persona designata. —When a gift is made by a Deed or Will to a boy who has been adopted, or whose adoption is directed by the donor, but who is not adopted or whose adoption is held invalid, then a question arises with respect to the validity of the gift. If the intention is clear to benefit the boy who is identified irrespective of adoption, the reference to which is intended as mere description, then the gift must be held good. (i) But if on the other hand, the adoption of the boy appears to be the condition of, or the moving consideration for, the gift, then the gift cannot take effect, if the adoption fails or is pronounced invalid. (j)

Sec. 7—JUDICIAL PROCEEDINGS

Suit to set aside an invalid adoption. —The presumptive reversioner (k) i.e., the next heir, and when he refuses or is in collusion, or is a female, the remoter reversioner, may bring a suit for declaring the invalidity of an adoption during the life of the adopting widow or after her death.

The grounds on which such suits are brought are: (1) the absence or illegality of the power of adoption given to the widow, (2) the ineligibility of the boy by reason of his being within prohibited degrees for adoption or other defects, (3) the non-performance of the necessary ceremonies and (4) the corrupt and capricious motive on the part of the adopting widow.

Onus. —A person setting up title on adoption as against another who would succeed in case there was no such adoption, must prove the fact of adoption by evidence free from all suspicion of fraud, and the *onus* is on him to

(h) 34 M.L.J. 258; 22 B. 551. | (i) 12 I.A. 72
 (i) 3 I.A. 253. | (k) 42 I.A. 125; 43 I.A. 20.

prove the adoption, both as regards the power of the adopter and the fact of adoption. (*l*) But when the adopted son has been treated as such for long series of years, slight evidence will be sufficient, and Courts will presume adoption as also the authority of the widow to adopt; (*m*) and so the person who challenges, long after adoption, the authority of adoption, must clearly prove the want of it. (*n*)

Evidence. —The factum of adoption is to be established by clear and satisfactory evidence, when there is no written record of adoption, when the child's name was not changed, when he was not recognised as an adopted son and when the accounts do not refer to any expenditure on adoption, the briefest possible evidence of the ceremony having taken place, is highly improbable. (*o*)

Estoppel. —A widow, representing that she had authority to adopt, made an adoption; she will be estopped to impeach the adoption on the ground that she had no authority; but estoppel is purely personal and it does not bind one who claims by an independent title. (*p*)

Limitation for declaring invalidity of adoption. —The reversioner in a suit for possession will get twelve years time from the death of the widow. (*q*) A suit by a widow to recover possession of her husband's estate on declaration that an alleged adoption is false, will be barred if brought after twelve years from the death of the husband. (*r*)

But a suit for declaration that an adoption is invalid, will be barred by limitation, if brought more than six years from the date of knowledge of the plaintiff. (*s*)

(*l*) 5 W.R.P.C. 109; 37 I.A. 1.
(*m*) 36 C.L.J. 434; 48 M.L.J. 353; 42 A. 382.

(*n*) 89 I.C. 817.
(*o*) 35 C.W.N. 465 P.C.; 44

C. 201 P.C.
(*p*) 39 I.A. 142.

(*q*) 51 I.A. 220.
(*r*) 35 C.W.N. 465 P.C.
(*s*) 38 C.W.N. 153 P.C.

Sec. 8—DVYAMUSHYAYANA ADOPTION —

A boy who is adopted in the *Dvyamushyayana* form retains his natural relationship to all the original relations, and acquires, in addition a new relationship to his adoptive parents and to their relations. (*t*) A son could be of this description by agreement at the time of adoption, (*u*) and not by reason of the performance by the natural parents of any initiatory ceremonies for the boy: such a son of two fathers is called *Nitya-dvyamushyayana*. (*v*) An express adoption in this form is now rare. The widows of brothers like their husbands, can give or take an only son in adoption in the *Dvyamushyayana* form. (*w*)

Sec. 9—KRITRIMA ADOPTION

Dattaka and *Kritrima*.—The *Kritrima* form differs from the *Dattaka* only in this, that in the latter the boy is given in adoption by his natural parents or either of them, whereas in the former, the consent of the boy only is necessary who should therefore be destitute of his parents, and thus *sui juris* so as to be competent to give his assent to his adoption ; in all other respects there is no difference between the two forms.

Prevalent in Mithila.—But the so-called *Kritrima* adoption that is now prevalent in Mithila appears to be a modern innovation and altogether a different institution from that dealt with in Hindu law. An adoption in *Dattaka* form here is not, however, invalid. (*x*)

A contractual relationship. —The *Kritrima* form of adoption, such as is now made in Mithila, does not appear to be an affiliation but is something like a contractual relationship between the adopter and the adoptee only.

(*t*) 13 M.I.A. 85; 57 B. 74. 77.

(*u*) 5 I.A. 40.

(*v*) 26 A. 472.

(*w*) 57 B. 74. 77.

(*x*) 5 P. 777; see 41 C.W.N.

161.

Both husband and wife may adopt. —In this modern form a man and his wife may either jointly adopt one son, or each of them may separately adopt a son, so that the son adopted by the husband does not become the wife's son and *vice versa*; and in such a case the son of the one does not perform the exequial ceremony, nor succeed to the estate, of the other. (y)

Elements of Kritrima adoption. —The offer by the adoptive parent expressing his desire to adopt, and the consent to it by the boy, expressed in the lifetime of the former are sufficient to constitute adoption. No religious ceremonies or burnt sacrifices are necessary in this form. (z) There is no restriction in this form as to the capacity of boy adopted, such as being an only son, particular age, or performance of the *Upanayana* ceremony or marriage, and particular relationship. (a)

His status. —The adoptee in this *Kritrima* form does not lose his status in his family of birth, and by the adoption he acquires the right of inheriting from the adoptive parents or parent alone. He cannot take the inheritance of his adopter's father or even of the adopter's wife or husband, the relationship being limited to the contracting parties only. (b)

Places other than Mithila. —It appears to prevail in many places in Northern India if not also in the Deccan. But this form whenever met with, at a place other than Mithila, must not be confounded with the modern innovation of the latter district, which though called *Kritrima* is altogether different from it. The real *Kritrima* form is exactly similar to the *Dattaka* one as regards their incidents.

***Kritrima* and *Putrika-putra*.** —Properly speaking the name *Kritrima* should not be applied to the adopted sons

(y) 2 Sel. Rep. 29, 33.

(z) 1 Sel. Rep. 11.

| (a) 3 Sel. Rep. 192: (145 Old).

(b) 25 W.R. 255.

that are popularly called by a different name in Mithila, namely, *Krita-putra* which does not appear to be a corruption of *Kritrima-putra* but of *Karta-putra*. It is observed that the adoption of *Karta-putra* is not an adoption in the *Kritrima* form, and held that his position is not better than a *Dallaka putra* and that succession to the estate of the adoptive father is not inherent in the status as a *Karta-putra*. (c)

Sec. 10—ADOPTION OF DAUGHTERS

Adoption of daughters.—The adoption of a daughter appears to be a general custom amongst the dancing-girls and prostitutes who have no daughters born of their body. The Calcutta, (d) Bombay (e) and Lahore (f) High Courts have held that such adoption is illegal. But the Madras (g) High Court has held a contrary view.

Sec. 11—ILLATOM SON-IN LAW

Illatom son-in-law.—In some of the districts of Madras the custom of *Illatom* or affiliation of son-in-law exists. A person who has no male issue, although he may have more than one daughter, may affiliate a son-in-law in this form, whether at that time he was hopeless of having male issue or not. (h) A man is, however, competent to adopt a son in the *Dattaka* form after having affiliated an *Illatom* son-in-law. (i) Amongst the *Sudras* of the *Kamma* castes in the Madras Presidency there exists a custom of *Illatom* adoption by persons who had natural sons living at that time. (j)

The position of *Illatom* son-in-law is better than that

(c) 4 P. 824.

(d) (1818) 2 Morley's Digest 133.

(e) 37 B. 116.

(f) 1934 L. 659.

(g) 13 M. 133; see 23 M.L.J.

493; but see 38 M. 1144.

(h) 4 M. 272.

(i) 9 M. 114.

(j) 46 I.A. 168; 61 I.A. 200

of a son adopted in the *Dattaka* form. He stands in the same position as a natural-born son and in a competition with natural born sons, takes an equal share; (*k*) but he does not become a co-parcener in the family he is taken in so as to claim collateral inheritance. (*l*) At the same time his tie of relationship with natural family is not severed and consequently his natural right of inheritance in the natural family subsists. (*m*)

CHAPTER V

MITAKSHARA JOINT FAMILY

Sec. 1—GENERAL TOPICS

Three modes of devolution.—According to the Mitakshara the estate of a deceased male devolves in three different modes under different circumstances: (1) by *survivorship* if he was not separated at all; and by *succession* in * two different orders: (2) if a person was separated from his co-parceners and not re-united with any of them after separation: (3) if he was re-united with any of the co-parceners after separation.

Survivorship.—If he was a member of a joint undivided family his interest in the joint ancestral property and in the accretions to the same, passes on his death by survivorship to the surviving members of the family.

Ancestral property.—The term ancestral property is to be understood to mean the property of the father and other paternal lineal male ancestors in the male line, to which the right of the son or other male descendant in the male line accrues from the moment of his birth or rather conception, and which is on that account, called unobstructed heritage. Whether maternal grandfather's estate can be called ancestral property: *see post p. 100-101.*

(*k*) 4 M. 272.

(*l*) 67 M.L.J. 706.

(*m*) 12 M. 442.

* *Vide: Ch. VI and VII.*

Mother's stridhana & maternal uncle's estate.—The members of a joint family succeeding to their mother's *Stridhana* or to their maternal uncle's estate, take the same as *tenants-in-common* and not as *joint-tenants*, (a) so they have not the benefit of survivorship. (b)

Collateral's estate.—The property inherited by one from a collateral relation such as a *brother*, *uncle* and the like, is not taken as, and subject to the incidents of, ancestral property. (c)

Two widows or daughters.—In cases of two widows (d) and two daughters (e) survivorship apply to the property inherited by succession by two widows and two daughters.

Property obtained by gift.—Survivorship does not apply to property jointly obtained as a gift by two or more brothers living jointly, (f) or by two widows for their maintenances. (g)

Pass by survivorship.—It should be observed that the expression *pass by survivorship* is a contradiction in terms ; for the undivided coparcenary interest of a member in the joint property *lapses* on his death, and therefore *nothing passes* to the survivors whose right to the whole of the family property accrued at the time of their respective births, and no new right is acquired on the death of a member.

Succession.—If he was separated from his co-partners and was not subsequently re-united with any one of them, his estate descends agreeably to the rules of succession.* [The rules of succession also apply to the self-acquired and other separate property of a member of a joint family according to the *Shivagunga* case. (h)] If

(a) For import of: <i>see pp. 98-99.</i>	(f) 37 C.W.N. 464 P.C.; 26
(b) 27 M. 300.	B. 445.
(c) 32 M. 88.	(g) 56 I.C. 937 (Pat.).
(d) 11 M.I.A. 487.	* <i>Vide: Ch. VI.</i>
(e) 2 I.A. 113.	(h) 9 M.I.A. 539.

he was re-united with any of his co-parceners after partition, his estate goes according to a certain order of succession.**

The joint family—is a cherished institution of the Hindus and is the peculiar characteristic of their society of which it is the normal condition. This joint family system is organized on the principle of subordination, and not on that of co-ordination or equality of the members with respect to rank and position. Under it no two persons can be equal, one of them, must be superior and the other inferior relatively to each other.

The Hindus who are accustomed to live in joint family groups are attended and nursed by the members of their family when suffering from disease and the like and so do not require the aid of hospitals. The joint family takes care of its young orphans and its old and infirm members. It looks after and guards and protects the wives and children of its absent or deceased members. Under this system violence and cruelty to wives and children are impossible, and old age pension is unnecessary.

The Sapinda relationship in the sense of connection through participation in funeral oblations implies a celestial joint family composed of the manes of male and female members of a mundane joint family.

Sec. 2—MEMBERS OF FAMILY

Sub-Sec. 1—Males, females and dependants

Males.—The male members are, (1) those that are lineally connected in the male line, such as father, paternal grandfather, son, and son's son, (2) collaterals descended in the male line from a common male ancestor, (3) such relations by adoption, and (4) poor dependents.

Females.—The female members are, (1) the wife or the “widowed-wife” of a male member, and (2) his

** *Vide*: Ch. VII.

maiden daughter. There may, however, be cases in which a married daughter continues to live as a member of her father's family, sometimes together with her husband ; (i) a widowed daughter also may sometimes come back to her father's family and live as a dependent member thereof.

Poor dependents—Some helpless persons, mostly poor relations more or less distant, are also maintained as members of the family.

The female slave or concubine—and the illegitimate son, mentioned in the commentaries as members of a joint family, may now be so, only in very exceptional and rare cases.

Illegitimate son.—*Dasi putra* means also an illegitimate son by a continuous concubine. (j)

Concubine when entitled to maintenance.—The Privy Council, (k) in a case governed by the *Mayukha* school has held that a concubine is entitled to maintenance out of the estate of her deceased paramour, provided the concubine be permanent until the death of the paramour and sexual fidelity to him be preserved although the concubine be not kept in the family house of the deceased.

Right by birth of illegitimate son.—An illegitimate son does not acquire any right by birth to the property of his *Sudra* putative father, during whose lifetime he cannot claim any share ; (l) there cannot be any co-parcenary between them, (m) but two illegitimate brothers enjoying their putative father's property jointly after their father's death may form a joint family.

His right of representation.—An illegitimate son's claim for a share must fail, if it is not shown that the deceased father left any separate or self-acquired property,

(i) See pp. 51-52.

(j) 48 C. 643; 54 B. 455 P.C.

(k) 53 I.A. 153.

(l) 9 R. 266; 28 C. 194.

(m) 52 B. 300, 305.

but died undivided with his own father and brother who took the joint property by survivorship ; the illegitimate son could not represent his father in the undivided family. (n)

His status.—The son by a continuous concubine of a *Sudra* gets the status of a son ; and is entitled to maintenance but cannot demand partition when his father was a member of a joint family. (o)

An illegitimate son of any one of the three regenerate classes is entitled to maintenance out of the joint estate in the hands of the co-parceners of his deceased putative father. (p) An illegitimate son's right to maintenance is a personal right and is not heritable. (q) If the illegitimate son's mother be not a Hindu but a Christian, then he cannot claim even maintenance. (r)

Collateral's heritage.—An illegitimate son of a *Sudra* cannot inherit collaterally in preference to the legitimate heirs. (s)

When illegitimate son entitled to succeed.—An illegitimate son of a *Sudra* (t), but not of a Brahmin, (u) is entitled to succeed to the estate of his putative father, if he was not the offspring of an adulterous intercourse or of a connection forbidden by law.

Sub-Sec. II—Conversion to different faith

Conversion of a member to Christianity —at once effects his severance from the joint family. (v) But if all the members become Christians, their rights of co-parcenership will not be affected by this renunciation, if they adhere

(n) 27 M. 32.

519; 3 Luc. 416; 34

(o) 58 I.A. 402; 64 M.L.J. 500.

C.W.N. 944.

(p) I.L.R. (1938) B. 779.

(t) 33 M. 366.

(q) 27 I.A. 51; 57 I.A. 177.

(u) 60 B. 75.

(r) 27 M. 13.

(v) *Abraham v. Abraham*, 9

(s) 34 B. 321; 21 A. 99; 25 M.

M.I.A. 195; 40 C. 407.

to the old law. (*w*) But the Madras High Court holds a contrary opinion. (*x*)

Sec. 3—PROPERTY OF FAMILY

Sub-Sec. i—Unobstructed and obstructed heritage

Heritage unobstructed and obstructed.—*Heritage* is defined in the Mitakshara to be that property to which one's right accrues by reason only of his relationship to the previous owner. It is called *obstructed* where the accrual of the right to it is obstructed by the existence of the owner; and it is called *unobstructed* where the owner's existence offers no obstruction to the accrual of the right. (*y*) A son, a son's son, and any other remoter male descendant in the male line acquire from the moment of their birth or rather conception, a right to the property of the father, the paternal grandfather and other paternal male ancestor in the male line, and such property is, therefore, denominated heritage without obstruction. But when the right of a person arises to the property of his paternal uncle and the like relations, only on their death without male issue, on account of his being their heir, and to which property he had no right during their lifetime, such property is called obstructed heritage, the existence of the owner having offered the obstruction to the accrual of the right. (*z*)

Sub-Sec. ii—Joint and separate

Joint property, joint - tenants, Co - parceners and Tenants-in-common.—When two or more persons are entitled to the same property in equal or unequal share, it is said to be their joint property. The expressions *joint-tenants*, *tenants-in-common* and *co-parceners* are technical terms of English law used to designate different descriptions

(*w*) 23 B. 539; 40 C. 407.

(*x*) 10 M. 69.

(*y*) 36 B. 424.

(*z*) 1938 N. 7.

of co-owners of joint property with special incidents. Members of a Mitakshara joint family holding ancestral property are called *joint-tenants*, by reason of *unity of possession* and *interest* and *survivorship*.

The English *joint-tenancy* and the Mitakshara joint-tenancy differ from each other in many respects. The former is created by a grant under a deed of transfer *inter vivos*, i.e., by *purchase* and not by *descent*; while the latter owes its origin to inheritance only. (a) Under the former each co-tenant is entitled to the whole, as well as to his undivided equal share of the property, i.e. the whole estate as well as his own equal proportion are vested in each joint-tenant; but under the latter, the whole estate, not any share of it, is vested in each member, who whilst undivided, cannot predicate of the property that he has any definite share, which again when ascertained by partition is not necessarily equal. Accordingly, an English joint-tenant possesses an absolute power to dispose, by a transfer *inter vivos* but not by a Will, of his own share, and so to put an end to his joint-tenancy; whilst a member of a Mitakshara joint family, having no definite share, (b) cannot alienate his undivided co-parcenary interest, and he cannot destroy the joint tenancy except by separation which he is at liberty to effect whenever he chooses.

An English *joint-tenancy* is said to be distinguished by four unities, namely, (1) by unity of possession, (2) unity of interest, (3) unity of title and (4) unity of time of the commencement of such title. Of these, two only apply to a Mitakshara joint tenancy namely, (1) unity of possession, and (2) community of interest; and although inheritance is the common name of the title of all the members, still there is not unity of the same, nor is there unity of the time of its commencement. Except in cases of co-parcenary, joint-

(a) 50 C. 370; 9 R. 266.

| (b) 14 C.W.N. 298.

tenancy is unknown to Hindu law, (*c*) and it cannot be created by any instrument even in such terms which according to English law may be admitted of such a construction. (*d*)

Co-parceners are two or more persons who jointly inherit property, whereof they have unity of possession which, however, may be severed at any time by partition. There is no survivorship, each taking an undivided share, which, on his or her death, goes to his or her heir. The co-heirs and their heirs are called co-parceners so long as unity of possession continues.

Tenants-in-common are such co-owners of property as hold it by several and distinct titles, but by unity of possession.

Joint property —is of the essence of the notion of a joint family. It consists, (*1*) of the ancestral property, (*2*) of the accession to the same, (*3*) of the acquisition with joint funds and (*4*) of the self-acquired property thrown into the common stock, *i.e.*, when the acquirer allows such property to be treated as family property so as to convert it into joint property. (*e*)

Joint inheritance of obstructed heritage. —When two or more members of a joint family jointly inherit according to the rules of succession property left by a deceased relation as obstructed heritage, they hold such property as the co-parceners in English law before partition, *i.e.*, the tenancy of the co-heirs of obstructed heritage is like tenancy-in-common, the right of each extending to his undivided share only, and there being no survivorship between them. (*f*) But the case of *Raja Chelikani* (*g*) has introduced an exception to this rule by holding that two brothers succeeding to their maternal grandfather's estate hold the

(*c*) 30 C.W.N. 39.

(*d*) 37 C.W.N. 464, P.C.; 8
Luc. 121.

(*e*) 44 I.A. 201; 33 C.W.N.

435 P.C.

(*f*) Karuppai v. Sankara 27
M. 300. F.B.

(*g*) 29 I.A. 156.

'same like joint-tenants having the benefit of survivorship. The Bombay High Court, however, has held that under the law of the *Vyavahara Mayukha* as also under that of the Mitakshara, property inherited by sons from their mother descends to them, not as a joint-tenancy, but as a tenancy-in-common. (h) But a later Privy Council decision (i) has practically disagreed with its earlier decision in *Raja Chelikani's* case explaining this latter decision to confine to cases of sons of an only daughter.

Separate—property of female members is called *Stridhana* which will be separately dealt with. (j) Separate property of a male member consists, (1) of his self-acquired property, and (2) of property inherited by him as obstructed heritage according to the rules of succession, (k) excepting, however, the maternal grandfather's estate in certain cases. (l)

Sub-Sec. III—Ancestral and acquired

Ancestral—property may be defined thus : property acquired by a lineal male ancestor in the male line, devolving by inheritance on a son or other male descendant in the male line, becomes ancestral on the death of the ancestor, in the hands of the descendant. (m) Property inherited from the maternal grandfather has been held by the Privy Council to become ancestral in the hands of the two sons of his only daughter, and they take as joint-tenants with the benefit of survivorship. (n)

So property inherited collaterally from a brother is not an ancestral but self-acquired property. (o)

A share of ancestral property obtained by partition

(h) 36 B. 424.

(i) I.L.R. (1937) A. 655.

(j) See Ch. XII and XIII.

(k) 32 M. 88; 13 L. 491.

(l) See foot notes (g), (h), (i).

above. *

(m) 20 W.R. 189; 8 Luc. 28.

(n) I.L.R. (1937) A. 655; 29

I.A. 156.

(o) 45 C. 733 P.C.

continues to be ancestral in the hands of the coparcener getting the same. (*p*)

There is a great diversity of opinion in the Courts in India as to the effect in a Mitakshara family of a bequest made by the father of property which in the father's hand was self-acquired to his son. The Privy Council has clearly expressed it but has reserved its opinion for a future occasion to be based on a consideration of the original texts of the Mitakshara. (*q*)

On a consideration of the texts, it will appear that the gift of the self-acquired property of the father becomes the self-acquired property of the son, unless the donor limits the rights of the son in express terms.

Accretions to ancestral property, by purchase with the income thereof or otherwise, are deemed ancestral. (*r*)

Ancestral, lost and recovered. —Ancestral property lost to the family when recovered by the father is deemed his self-acquired property as against his sons. But when it is recovered by any other member solely by his own exertion, then, if the property be moveable, he is entitled to a quarter share as his remuneration for the exertion in recovering it, and the residue is to be shared by all the members including him.

Acquired —property may be thus subdivided :—

(1) What has been acquired with the ancestral funds, i.e., accession to the family estate.

(2) What has been acquired with the aid of joint ancestral funds but by the special personal exertion of any member.

(3) What has been acquired by the joint exertion of all the members—the exertion need not be of the same kind, for instance, if of two brothers one goes out to a distant

(*p*) 3 C. 1; 6 W.R. 71; 3 M.H. C.R. 50, 55; 12 B. 122.

A. 256; *see*, 1930 S. 174.

(*q*) Lal Ram v. Deputy. 50 I.

(*r*) 10 B. 528, 580; 13 M.I.A. 542.

place and earns money there, and the other remains at home in charge of family and the property of both, to take care of them, then any property acquired with the money earned by the first brother must be regarded as joint acquisition. (s)

(4) What has been acquired entirely by the personal exertion or influence of a member without any aid from, or detriment to, joint funds, or what is called self-acquired property.

(5) Self-acquired property allowed by the acquirer to be enjoyed by all the members in the same manner as if it were joint property, and so thrown into the common stock, otherwise it remains as the self-acquired property of the acquirer. (t)

Gains of science. —This subject has no more than an academic interest since 1930 the question being settled by legislation. Act XXX of 1930 provided that notwithstanding any custom, rule or interpretation of the Hindu law, no *gains of learning* shall be held not to be the exclusive and separate property of the acquirer.

Sub-Sec. iv—**Immovable, corody, movable**

Immovable—property is of very great importance in India where agriculture is the chief source of wealth of the people.

Corody—is *Nibandha* which means, what is settled or a settlement: it is according to the Mitakshara an interest issuing out of land such as a royal grant or assignment to any person of the king's share of the produce of any land, in part or whole. It is explained in the Dayabhaga to mean what is settled to be given as an annuity.

Nibandha can also be created by persons other than kings. The Bombay High Court has expressed an opinion

(s) 14 Bom. L.R. 237.

(t) 10 M.I.A. 490, 505; 34 I.A.

65; 44 I.A. 201; 60 C.

1253.

to the same effect. (*u*) Hence the office of hereditary priest—*Yajman Vritti*—is a *Nibandha*. *Nibandha* whether secured on land or not would rank with *Sthabara* or immovable property, (*v*) particularly for the purposes of inheritance, (*w*) and the Limitation (*x*) and Registration (*y*) Acts.

Movable—property is not regarded so important as immovable by Hindu law which allows, therefore, a greater freedom with respect to the alienation of the same.

Negotiable instruments.—A coparcener cannot sue on a negotiable instrument (*e.g.*, promissory note) payable to a deceased coparcener or order, for he cannot give a valid discharge to the maker thereof, nor does he represent the estate of the deceased which passed to him by survivorship (*z*)

G. P. Notes.—See Ch. XVI, Sec. 2, Sub-Sec. i.

Sub-Sec. v—Trade

Nature of joint-family trade.—Joint-family trade is a species of ancestral joint property (*a*) in which every member (*b*) of a Mitakshara joint family acquires by birth an interest, in the same way as in other kinds of property: they become not only co-parceners but also copartners of the trading firm. The joint-family trading partnership differs from ordinary partnerships in two respects, namely, (*1*) it is not dissolved by the death of any member (*c*) and (*2*) members of the family become co-parceners by operation of law. (*d*) Not only the assets of the trading business but all kinds of the joint-family property would be liable

(*u*) 36 B. 94, 101.

(*v*) I.L.R. (1938) A. 904 F.B.; 33 B. 373.

(*w*) Mit. Ch. 1, Sec. v, 4; *Viramitrodaya* Ch. II Pt. I, Sec. 13; *Daya*. Ch. II. 9.

(*x*) 19 B. 663.

(*y*) 34 B. 287.

(*z*) 59 B. 573.

(*a*) 1929 L. 559.

(*b*) I.L.R. (1938) 2 C. 368 Daya. Case; 1933 M. 920.

(*c*) 48 I.A. 162.

(*d*) See Sec. 5, Indian Partnership Act (IX of 1932); 38 C.W.N. 914, 916.

for losses or for debts incurred for the purposes of the trade by the managing members.

Minor member's position in firm.—A Hindu infant who by birth becomes entitled to an interest in a joint-family business becomes at the same time a member of the trading partnership carrying on the business. But the infant shall not be liable personally for the debts incurred in such a trade, (e) but to the extent of his share in the assets of the firm.

Manager's powers.—The sole managers of the family business are ordinarily entitled to enter into contracts that are incidental to and flowing out from carrying on that trade in their own names to bind the other members and that they can be sued upon that contract without making the other members party to the suit. (f)

Manager's power to start new business.—A manager, even if he be the father of the other members of a joint-family governed by the Mitakshara or Dayabhaga school, cannot embark on a new trade, (g) so as to bind the other members with liability. (h)

The undivided members of a joint family may by common consent start a new business (i) and thereby clothe it with the character of joint-family property.

New trade with stranger and members position.—But when the member entering into partnership with a stranger contributes the capital from the joint-family fund, then as between himself and the other members of the family, he is to be deemed the representative of the family in the firm, and his share of the profits and the assets belong to the family, not to him alone. (j) In the absence of an agree-

(e) 42 C. 225, 233; 75 M. 692;
34 B. 72; 10 P. 503.

1938 B. 295; 41 C.W.N.
613 P.C.

(f) 38 I.A. 45.

(i) 48 A. 395.

(g) 59 I.A. 300.

(j) 1930 B. 1; 1930 L. 142.

(h) 59 I.A. 300; 16 P. 719;
H. L. 14

ment, the stranger partner is not bound to recognise any member of the family other than his partner as having any interest in the firm. (k) The relationship is to be governed by the provisions of the Contract Act (l) so far as they are not affected by the Indian Partnership Act. (m) And partnership must be dissolved on the death of that member whose share of the profits in his life-time and of the assets after his death may be claimed by all the members of the family as between themselves.

Creditor's duty. —A creditor lending money to a joint family for the purposes of a joint-family trade is not bound to enquire into the finances of the business in order to bind the whole family with the debt. (n) The real existence of necessity is not a condition precedent to the validity of his charge if he acted honestly and with due caution. (o)

In this connection: *see* Sub-section iv of Section 5 below:—"Duty of creditor dealing with manager."

Dissolution of partnership. —It has already been stated that joint-family business is not dissolved by the death of any member. But any member of the joint-family can dissolve the partnership by an unequivocal expression of his intention to dissolve it at once. (p)

Sec. 4—RIGHTS OF MEMBERS

Sub-Sec. 1.—Right by birth and ownership

Right by birth of sons, son's son, and the like. —A son or any other male descendant in the male line acquires from the moment of his birth, an interest in the ancestral estate in the hands of the father or the grandfather, which is co-equal to that of the latter in character, and also in extent as regards the grandfather when the father is alive or when

(k) 38 C.W.N. 1185 P.C.

(l) 38 C.W.N. 1185 P.C.;
1929 A. 199.

(m) Sec. 3 and 5.

(n) 34 B. 72.

(o) 58 I.A. 173.

(p) 1930 S. 83.

there is any other co-heir claiming through the father. *Birth* dates not from the moment the issue comes into separate existence but from that of his conception. (q)

In the Punjab a son acquires right by birth in the ancestral property unless modified by custom. (r) But he cannot enforce partition against his father. (s)

Right by birth to self-acquired property.—According to the Mitakshara a son or the like descendant acquires from his birth, a right also to the self-acquired property of the father or other paternal ancestor in the male line, the character of this right, however, materially differs from that acquired in ancestral property.

Ownership in Hindu law.—Neither the wife, nor the son nor the junior member, can enforce partition of the husband's property, or of the father's self-acquired property, or of the impartible estate, respectively; though in the first two cases partition may take place, on which they are entitled to get shares. Nevertheless they are regarded co-owners in Hindu law, according to which therefore, right to partition is not a necessary incident of ownership; nor is right of alienation, so.

Ownership, therefore, has two senses in Hindu law, which may be called perfect and imperfect respectively. The ownership of the wife, the son and the junior members, stated above, is imperfect, as it has not all the rights incidental to full ownership. Their ownership is acknowledged, as they use and enjoy the property in the same way as co-owners, and are entitled to have their maintenance out of the property, and are also entitled to the benefit of survivorship. They cannot, however, enforce partition nor alienate their right nor can they prevent alienations.

(q) 1929 L. 254.
(r) 43 I.C. 667.

(s) 1928 L. 911.

No limit as to degrees of descent.—A male descendant in the male line, however low in descent, acquires a right by birth to both ancestral and self-acquired property of a paternal ancestor.

But the rule is different if the paternal ancestor is separated from his descendants, and not re-united with any of them ; for then the rules of succession and inheritance, and not the co-parcenary rules, would apply to the property of the separated father or other paternal ancestor, according to which in default of male descendants in the male line down to the third degree, the widow, the daughter and the like heirs succeed. But from 14th April 1937 the widow gets a interest along with the male heirs down to the third degree under the Hindu Women's Rights to Property Act.

Sub-Sec. ii—Posthumous and adopted son

Posthumous son.—A son or the like descendants in the womb of his mother at the time of the death of his father, from or through whom he would acquire a proprietary right by birth if he were in existence during his father's life, becomes entitled to the same right if he comes into separate existence subsequently, his birth relating back to the time of his father's death. The Hindu law makes this concession only in favour of the male descendants in the male line. Hence a son and the like may be said to acquire the right from the moment of their conception ; but it is absolutely necessary that the child in embryo should be born alive or come into separate existence in order to be invested with the right ; for, the course of inheritance cannot be diverted by the mere foetal existence of a child not born alive ; and no person can claim an estate as heir of a still-born child.

This rule has been extended to other heirs taking by succession ; and the sister's son in embryo at the time of the maternal uncle's death was held his heir. (t)

(t) Sevestre's Reports, 328; 38 C.W.N. 90.

Adoption.—Adoption is tantamount to birth in the adoptive family and the adopted son acquires, from the moment of his adoption, an interest in the ancestral as well as the self-acquired property of his paternal ancestors by adoption.

Sub-Sec. III.—Son's rights

Father's and son's interest.—The character and the extent of the interest taken by a son in the *ancestral property* do not differ from those of the father's except so far as they are affected by the son's liability to father's debts. (u)

Ancestral movable and immovable.—Although sons acquire a co-equal right by birth to ancestral property, both immovable and movable, yet the law declares the father to be master of the movable. A bequest by a father to one of his two undivided sons of the bulk of ancestral movables, to the exclusion of the other, is invalid, as being an unequal distribution prohibited by Hindu law. (v)

Father's self-acquired property.—It has already been said that according to the Mitakshara a son acquires a right by birth to the father's self-acquired property in the same way as to ancestral property. Such property if undisposed of by the father is taken by the sons and the like by survivorship and not by descent.

Sub Sec. iv—Woman's rights

Wife's right.—The *Patni* or lawfully wedded wife acquires from the moment of her marriage a right to everything belonging to the husband, so as to become his co-owner. But her right is not co-equal to that of the husband. The husband alone is competent to alienate the same and the wife cannot interdict his disposal. Nor can

(u) 6 I.A. 88.

(v) 7 I.A. 181.

the wife enforce a partition of the property. It is also by virtue of this right that she gets a share equal to that of a son (*w*) when partition takes place at the instance of the male members. Thus the wife also of a male member becomes a co-parcener of the family property.

Unmarried daughter's right.—Similarly, an unmarried daughter acquires an imperfect right in the father's property by virtue of which she enjoys the same and is maintained out of it until marriage, and is also entitled to a quarter share if partition takes place before her marriage, that is to say, when she continues as member of the family. (*x*)

Sub-Sec. v—Enjoyment of property

Joint family property, right and enjoyment.—A member of a joint family, whether male or female, acquires a right to the joint property on his or her becoming a member by birth, adoption or marriage ; and conversely his right ceases on his or her ceasing to be a member of the family by death, adoption or marriage. A joint family, therefore, is like a corporation ; individual rights are all merged in the family or the corporate body and no member has any definable share in the joint property previous to partition. A member entitled to get the least share on partition, may, by reason of having a large family of his own to support, consume, during jointness, the largest portion of the proceeds of joint property, without being liable to be called upon to account for the excess consumption at the time of partition. The question of shares does not arise before partition ; no member can bring a suit for his share of the profits of joint property so long as the family is joint. (*y*)

The observations of the Judicial Committee in *Appovier's* case (*z*) should be carefully read in this connection.

(*w*) Hindu Women's Rights to Property Act: widow can demand partition.

(*x*) See 53 M. 84, 97.

(*y*) 14 I.A. 37.

(*z*) 11 M.I.A. 75.

Partition,—member's rights: *see* Section 10 below.

Extinction of Member's right.—Except in case of entrance to a religious order involving complete renunciation of the world or to another family by adoption, no person can divest himself of the property vested in him by mere disclaimer. (a)

Sub-Sec. vi.—Vesting and divesting

Extent of right or share, vesting and divesting.—The extent of a member's right in the family property, or the share to which he is entitled, cannot be ascertained before partition, for it is liable to variation by birth or death of members, it is increased or diminished respectively by the disappearance or addition of a co-heir.

Sec. 5—MANAGEMENT OF FAMILY

Sub-Sec. I—Manager

Necessity of manager.—The affairs of a joint family corporation consisting as it does of *Purdanashin* ladies and infants, cannot be managed by all the members of it, nor are they managed jointly by all the adult male members, probably by reason of the inequality in their rank; but ordinarily they are, by the tacit consent of all, managed by a single male member who becomes the head of the family by reason of his seniority and superior rank and is called the *Karta* (actor or agent) of the family. But he is not an agent in the strict sense of the term. (b)

Economy of expenditure.—Although the *Karta* of a joint family administers its properties for the purposes of the family as its accredited agent, yet so long as he does so manage its affairs, he is not under the same obligation to economise or to save as would be the case with a paid agent

(a) *See* 1936 N. 186.

(b) 35 M. 177.

or a partner in trade, or a trustee. If he manages the family affairs honestly and in an unselfish manner no objection can be taken on the ground that expenses were incurred by him in an extravagant scale ; nor is he liable to be called upon to defend the propriety of past transaction. (c)

Manager's rights and liabilities.—A *Karta* or manager cannot alienate or burden the estate *qua* manager except for purposes of necessity and is, therefore, competent to pledge the credit and the property of the family for the purposes of the family, *i.e.*, for legal necessity and benefit to the estate. (d) A manager is personally liable for damage for failure to perform the contract when it is found that the contract is not binding on the minors. (e) He will be personally liable for damages for negligence and misconduct.

Alienation by manager.—See next Sub-Sec. ii.

Father Manager.—“ The father is in all cases naturally and in the case of infant sons, necessarily, the manager of the joint family estate.” Although the sons are co-owners with the father of the ancestral property with co-equal rights yet so long as they continue to live joint with the father and do not enforce a partition which they are at liberty to do whenever they please, they cannot interfere with the father’s management of the family and its property. The father’s power of alienation of the family property has been considerably extended by modern decisions, (f) purporting to be founded on the doctrine of the son’s liability to pay father’s debts.

Manager other than father.— In a family consisting of brothers, the elder brother, in the absence of any evidence to the contrary, should be presumed to be the manager of the family. (g) Although there is nothing to prevent any

(c) 9 C.L.J. 133; see Sec. 10,
Sub-Sec. iii below.

(d) 51 I.A. 129; see *post*
Sec. 7, Sub-Sec. iv, “ P.

C. on son’s liability.’

(e) 40 M. 338.

(f) 55 C. 210.

(g) 1930 L. 719.

member from taking part in the management yet, as a general rule, one member only acts as the *Karta* or managing head of the family.

Manager's remuneration. —The managing coparcener of a joint Hindu family is not entitled to any special remuneration.

Sub-Sec. II—Alienation by manager

Alienation —includes sale, gift, mortgage, lease or exchange. (h)

Manager's alienation when other members minors. — When the other members are minors, the manager, whether the father or a brother, may make a sale, mortgage or the like alienation of joint immovable property which is rendered necessary by any calamity affecting the whole family or for the support of the family or for indispensable religious duties such as obsequies of the father. The power of a manager for an infant to charge his property is a limited and qualified power as is pointed out by the Privy Council in the case of *Hunooman Persaud Panday*, (i) thus :—

" It, the power can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance, for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money."

(h) 44 I.A. 147.

(i) 6 M.I.A. 393.

This passage enunciates a very important general principle applied also to *alienation by a Hindu woman of property in which she has a Hindu widow's estate.*

The rule of law laid down in *Hunooman Persaud Panday* is not restricted to cases of mortgage or other partial transfers, nor is it restricted in its application to cases of secured loans or of necessity alone. (*j*) It applies to cases of sales as well. (*k*) The necessity is not to be understood in the sense of what is absolutely indispensable but what according to a Hindu family would be regarded as reasonable and proper. (*l*)

When other members majors.—As to the power of the manager when the other members are majors, the law is thus explained:—

"An alienation made by the managing member of a joint family cannot be binding upon his adult co-shares unless it is shown that it was made with their consent, either express or implied. In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family." (*m*)

The Privy Council thus explains the law:—The *Karta* cannot alienate joint property, "unless he obtains the consent of the other members of the joint family if they could give it, or unless there was established necessity to justify the transaction." (*n*)

Sub-Sec. III—Legal necessity and benefit

Legal necessity.—The expression '*legal necessity*' is very often used to signify the causes for which, or the circumstances under which a single member of a joint family, or a like person, having a limited interest in property, is

(*j*) 26 C. 820; 39 M. 265; 20 C.W.N. 645.

(*m*) 12 C. 389, 399; see 60 C. 1197; 45 M. 281.

(*k*) 26 M.L.J. 528.

(*l*) 34 M. 422.

(*n*) 35 C.W.N. 693.

authorised to transfer it so as to pass to the transferee a right to the entire property ; and this principle applies both to the Mitakshara and Dayabhaga schools. (o) It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, performances of necessary religious rites such as marriage and the like initiatory ceremonies, exequial rites and *Sraddha* ceremony, and the payment of debts contracted for the above purposes. (p)

Family necessity—is an expression that must receive a reasonable construction. (q) It is not to be understood in the sense of what is absolutely indispensable, or is actual compelling necessity ; if the transaction as a whole was beneficial to the family, it is binding on the members. (r) It depends on the facts of each particular case. (s)

Benefit of the estate.—The Privy Council in *Pala-niappa Chetty v. Deivasikamony* (s) has given illustrations of what are *benefits to the estate*, namely, “*The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits.*”

Sub-Sec. IV—Creditors and allées

Duty of creditor dealing with manager.—The lender or purchaser dealing with a manager is bound to enquire into necessities for the loan or sale, and to satisfy himself as well as he can, that the manager's act is for the benefit of the family. (t) He is to prove legal necessity for the greater part of the consideration which will raise a presumption of necessity for the whole. (u) The *onus* is on him to establish that the contract was for the benefit of the family. (v) If he does

(o) 54 C. 380.

(p) 34 M. 422, 424.

(q) 24 C.W.N. 938.

(r) 7 P. 798; 1929 L. 397.

(s) 44 I.A. 147.

(t) 47 A. 459 P.C.; 54 I.A. 79.

(u) 1928 N. 232; 8 P. 558.

(v) 8 L. 673; 14 P. 595.

so enquire as to the existence of necessity, and acts honestly, he is safe ; he is not affected by the precedent mismanagement of the family property, nor by the subsequent non-application of the money to the purpose for which it is borrowed, (*w*) nor even by the non-existence of the alleged necessity if it is reasonably credited and is legally sufficient. (*x*)

Alienation by manager in excess of necessity.—The creditor is entitled to enforce his dues against the entire estate for the whole amount advanced, though an insignificant portion of it was not for legal necessity. (*y*) The question of necessity regarding a portion should not be allowed to be raised after a long lapse of time. (*z*) A sale also should not be set aside when a negligible amount was not applied for necessity, (*a*) nor when the portion of the consideration not required for necessity be not insignificant, provided the purchaser acted honestly and made due enquiry as to the existence of necessity ; (*b*) and if he could show that the sale itself was justified by legal necessity, then he is under no obligation to see to the application of any surplus and is therefore not bound to make re-payment of such surplus to the members of the family challenging the sale. (*c*) Therefore, a sale for necessity should not be set aside, merely because the difference between necessity and the consideration for the alienation is large as held in some cases. (*d*)

These principles are applicable to cases of mortgages, (*e*) of holder of widow's estate, (*f*) of *Sebayets* or *Mohants*, (*g*) and manager of infants estates.

(<i>w</i>) 45 A. 77; 49 B. 821; 1927 M. 890; 32 I.C. 454 (P.)	(<i>b</i>) 51 A. 430 P.C.; 54 I.A. 79; 54 I.A. 211.
(<i>x</i>) Hunooman Persud 6 M.I. A. 393; 58 I.A. 173.	(<i>c</i>) 6 M.I.A. 393.
(<i>y</i>) 1925 A. 624 F.B.; 1928 N. 232; 1928 M. 450.	(<i>d</i>) 51 A. 1039; 14 P. 595.
(<i>z</i>) 62 I.A. 70; 51A. 430 P.C.	(<i>e</i>) 8 P. 558, 566-7.
(<i>a</i>) 1929 A. 503; 1928 O. 465.	(<i>f</i>) 41 C.W.N. 18 P.C.; 8 I.A.
	(<i>g</i>) 24 C. 77; 1926 C. 287.

Remedies of parties when alienation set aside.—When the sale made by the *Karta* is set aside, the purchaser is entitled to get a refund of the sum applied for necessity, (h) and to compensation when the family had been benefited by the alienation, (i) or to require the person causing the eviction, either to have the value of the improvement made in good faith be paid to the transferee or to sell his interest in the property to him. (j) When alienation is set aside for gross inadequacy of price, the sale with respect to the entire property is to be set aside and not with respect to the portion as would not be covered by the sum applied for necessity. (k) The mortgage by the *Karta* for no legal necessity is not available to the extent of the interest of the mortgagor, unless special circumstances, were present.(l) An alienation is valid if substantial portion of the consideration was for legal necessity. (m)

Effect of alienation by manager without authority.—In case of an alienation by a widow, in excess of her powers it is not altogether *void* but only *voidable* at the instance of the reversioners. (n) This principle is applicable to cases of *Sebayets*, *Mohunts* and manager of infant's estate. (o) Such unauthorised alienation may be ratified or acquiesced in by the minor on attaining majority. (p)

An unauthorised alienation by some adult members of Mitakshara joint family who were the heads, is *void*. (q)

When an unauthorised alienation by the manager is avoided, the entire alienation is set aside and it will not operate to transfer the manager's own interest in the joint-family property. (r)

(h) See 34 I.A. 72.

(i) 17 I.A. 194.

(j) 51 B. 1040; 13 C.W.N. 391

(k) 62 I.A. 70.

(l) 44 I.A. 163.

(m) 1938 P. 301.

(n) 54 I.A. 396, see also Ch.

XII, Sec. 4, Sub-sec. vi.

(o) See *ante* foot notes (f) &

(g) above.

(p) 57 C. 3942; 8 M.I.A. 319;

6 I.A. 196.

(q) 44 I.A. 163.

(r) 1929 A. 479.

Sub-Sec. v—Family account

Manager's liability to account.—The principle upon which the right to call for an account rests, is not that the manager is to be looked upon as an agent or a partner. The members are entitled, not to accounts of past transactions, but to a division of the family property actually existing at the date of partition, except in cases of fraud, mistake, misappropriation and the like.

The law has been thus explained by the Privy Council in the case of *Arumilli Perrazu*; (s) : "In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with."

Bengal school.—The demand for an account may be made even during jointness by a member desirous to know the actual state of the family fund (t) Though the co-parceners of a joint family governed by the Dayabhaga school, have their shares defined in the joint property, yet the right of a co-parcener to call for an account from the managing member, is the same as laid down by the Privy Council in the case of *Arumilli Perrazu*.

Remedy of members.—Partition is the only remedy to which the other members are entitled for protecting their interests, if they are dissatisfied with the management of the managing member.

Sub. Sec. vi—Guardians and minors

Guardian for minor member of family.—The undivided coparcenary interest is not property of which a guardian appointed by the Court, can take care. So a Court cannot appoint one member the guardian of another in respect of the joint property.* (u) But a guardian may be appointed

(s) 48 I.A. 280.

616.

(t) 13 W.R.F.B. 75; 15 I.C.

(u) 1925 O. 642.

to take care of the person of such a minor, (*v*) or of his separate property. (*w*)

In the case of *Gharib-ul-lah* (*x*) the Privy Council observes:—“ It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And * * * the interest of a member of such a family is not individual property at all and that, therefore, a guardian, if appointed, would have nothing to do with the family property.” (*y*)

But if there be no adult male member in the family, then undoubtedly a guardian of their joint estate must be appointed until one of them attains majority. (*z*)

The High Courts of *Calcutta* (*a*) and *Bombay* (*b*) have held that they have got the power to appoint a guardian of a minor member's interest in an undivided Mitakshara joint family in which there are other adult members. The *Allahabad* High Court (*c*) has similarly expressed an opinion but did not follow it.

The *Privy Council* has questioned the propriety of the appointment of a guardian of the property of a minor, but refrained from expressing any opinion, as it was not necessary for the decision of the appeal. (*d*)

Parents as guardian.—Except the parents no other person has the absolute right to guardianship of their children. (*e*) The father is the natural guardian of the person and separate property of the sons and maiden daughters; (*f*) and after him the mother is the natural guardian. (*g*) But the father may deprive the mother of the guardianship of such minors by appointing another person as guardian. (*h*)

(*v*) 19 B. 306 (F.B.)

(*w*) See 36 C.W.N. 769.

(*x*) 30 I.A. 165, 170.

(*y*) See 40 I.A. 117.

(*z*) 15 I.C. 424 (C); 32 B. 252; 11 Luc. 67.

(*a*) 50 C. 141.

(*b*) 54 B. 75.

(*c*) 50 A. 709.

(*d*) 58 I.A. 190.

(*e*) 2 Pat. L.J. 190; 38 M. 1125; 42 A. 146.

(*f*) 12 B. 110.

(*g*) 47 A. 784; 5 Bom. L.R. 542; 24 N.L.R. 8; 11 L. 312.

(*h*) 43 A. 213 see, 44 M. 189;

31. B. 413.

Re-marriage of mother guardian.—By re-marriage, according to the custom of her caste, a widow does not lose her right of guardianship (*i*) though the mother by re-marriage forfeits her preferential right. (*j*) The Court under Hindu Widow's Re-marriage Act has a discretion to remove a mother from the office of guardian of the children of her first marriage.

Change of religion of parents.—The conversion of the father into Islamism (*k*) or the mother, (*l*) into Christianity would not in itself be a ground for removing from the guardianship, unless he or she acts contrary to the obligations which the law imposes upon the guardian of bringing up the children in his old faith.

Guardians other than parents.—All persons, other than the parents who have absolute right to guardianship, must derive their authority from the Court. (*m*) The paternal grandfather (*n*) and elder brother are natural guardians. (*o*)

Where there is no natural guardian alive, steps must be taken in a proper Court representing the rights of the Crown which is paramount to even the parents, to have a guardian appointed of a minor (*p*) or a manager of a lunatic. (*q*)

Appointment of guardian by parents.—The father can orally or by writing nominate a guardian for his Wards. The mother may likewise, exercise the power of nomination, but she cannot do so by Will. (*r*)

As to the testamentary powers of the father, to appoint the guardian of the minor with regard to his interest in the joint-family property, to take effect after the father's death,

(*i*) 38 C. 862; 33 B. 107, 144;
15 L. 29.
(*j*) 38 C. 862; 48 I.C. 75 (N).
(*k*) 12 S.L.R. 14.
(*l*) 20 C.W.N. 608.
(*m*) 1925 L. 503.

<p>(<i>n</i>) 1928 M. 42. (<i>o</i>) 57 C. 39, 42. (<i>p</i>) 38 M. 1125. (<i>q</i>) 1929 N. 93. (<i>r</i>) Venkayya <i>v.</i> Venkata, 21 M. 40r.</p>
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the *Bombay* High Court holds conflicting opinions. (s) Though this difference has been noticed by the same High Court, the question has been kept open, (t) but it leans towards the view that he has got no such power. The *Allahabad* High Court (u) holds that a father can nominate a guardian. The *Calcutta* High Court (v) holds that the father has got such power. The Full Bench of the *Madras* High Court (w) holds that the father has got no such power.

Powers of guardian.—The father is the natural guardian of his children during their minorities, but their guardianship is in the nature of a sacred trust, and he cannot therefore during his life-time substitute another person to be guardian in his place. He may “entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation.” (x)

The power of the testamentary guardian is limited to the terms of the Will. (y) The natural guardian can without the sanction of Court, alienate the property of minor for the benefit of the minor, but a guardian appointed by the Court cannot, (z) his powers being limited. (a)

The power of even the manager of a joint family,

(s) 29 B. 351; 38 B. 94.

(y) See Sec. 28 of Act VIII of 1890.

(t) 52 B. 16, 30.

(z) 23 C.W.N. 634; 1925 N. 134.

(u) 43 A. 213.

(a) 29 C.L.J. 280; this not

(v) 7 W.R. 74.

touched by P.C. see 49

(w) 41 M. 561.

I.A. 660.

(x) *Annie Basant v. Narayaniah*, 41 I.A. 314.

appointed as a guardian for a suit, is subject to the control of the Court. (b)

Sec. 6—ALIENATION

Sub-Sec. 1—Alienation of property

Separate property of member.—A member of a joint family may have his separate or self-acquired property, not thrown into the joint stock, over which he has absolute power of disposal and which can be sold in execution of a decree.

Alienation before birth of male issue.—A male issue becomes entitled by birth to property which is in actual existence at the time of his birth *i.e.*, at the time of conception.(c) He cannot lay any claim to property which had, before he was born or begotten, been validly alienated by the father. (d)

Family property.—Although the female members of a joint family are entitled to certain rights in the family property, yet as their right is imperfect, male members alone have the right of alienation of any property when it becomes necessary for a purpose affecting the whole family. The male members must all join in the transaction in order to be bound by it. But if some of them are minors, then those that are adults are competent to make the necessary transfer. But a transfer by all the adult members will not make the transfer binding on the family when there was no necessity.(e) It is already seen (f) that the manager alone may alienate with the express or implied consent of the other adult members. The father of the family has the power of alienating the whole property for the payment of his debts which the sons are held bound to pay: (g)

(b) 40 I.A. 32.

(c) 1929 L. 254.

(d) 59 M. 667; 45 A. 49: 21
N.L.R. 38; 8 P. 558.

(e) 1930 A. 379.

(f) See, *ante* p. 113-114.

(g) 13 I.A. 1; see *post* pp. 129-133.

Sub-Sec. II—Alienation of undivided interest

Alienation of undivided co-parcenary interest of a member.—The Mitakshara theory of the tenure of joint property held by members of a joint family, is that each co-parcener's right extends to the whole ; whereas the Dayabhaga doctrine is that each member's right extends only to the share to which he would be entitled on partition, and not to the whole. According to the Mitakshara, one member cannot alienate his undivided interest in the family property, for he has no definite share in it. (h)

But the Dayabhaga controverts these doctrines by setting up a different theory of co-ownership as stated above, and maintains as incidents of this theory, that a single co-sharer, is competent to deal with his undivided share, and that such share does not pass by survivorship, but devolves on the heirs succeeding to his separate property.

Different views on alienation of undivided interest :—

In Bombay, Madras, the Central Provinces and Berar—the strict ante-alienation rule of the Mitakshara has been departed from ; and it has been held that a co-parcener can for *valuable consideration*, sell, encumber, or otherwise alienate his interest in undivided family property. (i)

In Bengal, Behar & Orissa, the North Western Province, Oudh and the Punjab—the ante-alienation doctrine of the Mitakshara is strictly followed so far as *voluntary alienation* by a co-parcener, of his undivided interest, is concerned. The Privy Council has laid down that under the Mitakshara, as administered by the High Courts of the North-Western Provinces and Bengal, an undivided share in ancestral estate held by a member of a joint-family co-parcenary, cannot be mortgaged by him on his own account without the consent of his co-parceners. (j) This has been adopted by the Patna

(h) 44 I.A. 126; 49 I.A. 228.

(j) 20 I.A. 116; 44 I.A. 126;

(i) 20 I.A. 116; 7 I.A. 181;
6 I.A. 88; 1928 P.C. 165.

21 C.W.N. 957 P.C.

High Court. (*k*) So also it is in Oudh. (*l*) The same view is held in the Punjab. (*m*)

An alienation of undivided share of a co-parcener in a Mitakshara joint family in these parts of the country is *void*, (*n*) except those within the jurisdiction of the Allahabad High Court where it is *voidable*. (*o*)

Involuntary sale in execution before death.—The undivided co-parcenary interest of a member in the joint property may be seized and sold in execution of a decree against him for his personal debts. (*p*) The debtor, therefore, ought to have come to a partition, and applied his share to the payment of his debts ; he cannot in equity and good conscience be permitted to defraud his creditors or to escape his liability under a contract (*q*) by choosing to continue joint and to enjoy the same : his undivided co-parcenary interest, therefore, is allowed to be seized and sold in execution of a decree against him, and the purchaser is entitled to get his share on partition. But this can be done only during the debtor's life-time, and the interest must be attached before his death, otherwise the right by survivorship would operate and defeat the creditor's equity. (*r*) A compulsory sale, in execution, of a deceased member's share attached before his death, is taken to operate as a partition, though partition, in so far as it means division of possession, may be effected by a suit subsequently brought for the same. (*s*)

Rights of purchaser of undivided share.—It is already said that the interest of a member is liable to variat according as existing co-parceners die or new co-parceners are born, until it is adjusted by partition ; but a Full Bench (*t*) of the Madras High Court, disagreeing with a previous Full Bench

(*k*) 5 Pat. L.J. 605, 618.

(*o*) 53 A. 21.

(*l*) 17 I.A. 194.

(*p*) 4 I.A. 247.

(*m*) 14 L. 584.

(*q*) 1922 P.C. 397.

(*n*) 44 I.A. 163; 49 I.A. 228

(*r*) 17 I.A. 194; 1938 P.C. 7.

23 O.C. 284; *see post*

(*s*) 11 I.A. 26.

pp. 125, 126.

(*t*) 35 M. 47.

decision, (*u*) has laid down, that "the alienee is entitled to the interest alienated, and that such interest would neither be diminished by an increase, nor increased by diminution in the number of co-sharers." But a recent Division Bench (*v*) has followed the earlier Full Bench. The Bombay (*w*) High Court has followed the principle laid down by the latter Full Bench.

In case of a sale of the complete undivided share of a co-parcener, the division in status takes place and the alienor ceases to be a member of the joint family. (*x*) The purchaser, who is a stranger to the family, at an execution sale of undivided co-parcenary interest in a dwelling house of a member of joint family, is not entitled to joint possession ; (*y*) nor is he entitled to separate possession without partition.

Sub-Sec. III—Gift

Affectionate gift.—The father of a joint family is competent to make a gift of a small portion of the property out of affection in favour of a male or female member of the family, (*z*) and this has been held allowable in favour of daughter but not in favour of daughter's daughter, daughter's son, widow or mother ; (*a*) and not in favour of one who is not a near relation. (*b*) But he cannot alienate any considerable portion by way of affectionate gift to the members of the family, (*c*) even within the limits of his share. (*d*)

Gift in favour of volunteer.—A Hindu, even in Bombay and Madras schools, cannot make a valid gift of his interest in undivided property, (*e*) such gift is *void* and cannot prevent survivors from taking the share. (*f*)

(*u*) 14 M. 408.

(*v*) 56 M. 534.

(*w*) 41 B. 347.

(*x*) 30 M.L.J. 592, 596.

(*y*) Sec. 44, Transfer of Property Act.

(*z*) 34 I.A. 107.

(*a*) 1936 M. 825.

(*b*) 1929 A. 854.

(*c*) 40 M. 1123.

(*d*) 1925 M. 60.

(*e*) 32 C.W.N. 3 P.C.

(*f*) 7 I.A. 181. See *post*.
p. 126 and *anti* p. 124.

Sub-Sec. iv—Will

Devise of undivided interest.—No Hindu governed by the Mitakshara can make a testamentary disposition of his undivided interest in the joint family property, which interest passes on the moment of his death by survivorship, to the surviving male members, so that there is nothing left on which his Will can operate. (g)

The head of the joint family has not even the right to make a partition by Will of joint property among the various members of the family except with their consent. (h)

Voidable.—A testamentary bequest is not void *ab initio* but only voidable. (i) See *ante* pages 124 and 125.

Sub-Sec. v—Setting aside alienation

Who can challenge.—An invalid alienation of coparcenary property can be challenged by the son (j) including adopted son (k) or any co-parcener (l) who is entitled to a share on partition. But the contest can be made by a person who was born, begotten or adopted before the alienation was completed or before a valid ratification of the alienation by all the co-parceners was made. (m) A purchaser at a subsequent valid sale, can also contest previous invalid alienation. (n) So also a successor-at-law of one undivided member can challenge an invalid alienation made by another deceased member. (o)

Extent to which alienation set aside.—In Bombay, Madras and the Central Provinces a co-parcener can set aside an invalid alienation of the co-parcenary property except the share of the alienor. (p) But in Bengal including Behar, the

(g) 59 B. 644; 14 L. 178; 1936 Pcs. 130; 1936 M. 479; 7 I.A. 181.

(h) 40 I.A. 161.

(i) 10 L. 389.

(j) See *ante* p. 122.

(k) See *ante* pp. 85, 87.

(l) See p. 122 above.

(m) See p. 122 above.

(n) 51 A. 575.

(o) 47 A. 490.

(p) 52 B. 307; 23 M. 89; See p. 123.

United Provinces and the Punjab, the co-parcener is entitled to set aside the whole alienation. (q) In cases where alienation of undivided share is allowed (r) and where the alienation is partly valid, it is equitable to distribute the whole of the consideration for the sale over the whole of the property sold in proportion to the value of the shares of the co-parceners and the alienor. (s)

When the alienation is set aside, the transferee for valuable consideration is entitled in equity to compensation when the family has been benefited by the alienation, (t) or when such transferee has made improvements of the property, (u) to the knowledge of and without protest (v) from the persons challenging the alienation, or without their knowledge believing it in good faith, to be a valid transfer. (w)

Sec. 7—DEBTS

Sub-Sec. I—Debts contracted by manager

Family debt. —When a debt is contracted for a family purpose by any member of the family, it is payable by the family or by all the members. It is seen that the manager of a joint family (x) or of its trading or money-lending business, (y) is competent to charge or alienate the family property for a legal necessity or for benefit of the family (z) falling within the scope of his authority.

Sub-Sec. II—Personal debt of member

Personal debt of a member. —According to the strict theory of the Mitakshara law, the family property is not liable for the personal debts of a member.

(q) 17 I.A. 195; 44 I.A. 163;
44 I.A. 126.

(r) See p. 123..

(s) 37 M. 435.

(t) 17 I.A. 194.

(u) 1928 A. 41.

(v) 21 B. 740.
(w) Tr. of Property, Sec. 51.

(x) Ante p. 113-114.

(y) See p. 104.

(z) Legal necessity: see Sec. 5.

Sub-Sec. iii, *supra*.

Sub-Sec. III—Liability of heirs for debts

Liability of the heir by survivorship.—The Hindu law declares the heir of a person, whether taking by survivorship or by succession, to be liable for his debts. The Hindu law discloses a high sense of morality as regards the payment of debts, which is religiously necessary for the salvation of the debtor's soul.

Collateral co-parcener's debts.—The debts of the male ancestors in the male line stand on a different footing from those of collateral co-parceners of the same rank with them ; accordingly a fraternal nephew is not bound to pay the debts of his paternal uncle, nor is his undivided co-parcenary interest liable to be attached and sold in execution of a personal decree against the uncle, though he is the head of the family. (a)

Sub-Sec. iv—Father's debts

Son's liability for father's debts.—The liability of a son for father's debts has undergone a gradual change by judicial decisions. A son has a pious duty to pay the father's debts not contracted for illegal or immoral purposes. (b) This liability is confined to the extent of the assets inherited by the son, (c) and it makes no difference whether the debt is secured or unsecured, (d) or it was for the benefit of the son, (e) or the family (f) or not, or the father was the manager of the joint family or not. (g)

The liability of the son to pay the father's debt is not a joint nor a joint and several liability as is ordinarily understood in English law. (h)

The son given away in adoption is not liable for the debts of his natural father. (i)

(a) 30 A. 460.

(b) See post p. 133.

(c) See post p. 133.

(d) 53 A. 868.

(e) 2 Pat. L.J. 212.

(f) See post pp. 129, 133.

(g) 53A. 868.

(h) 40 M. 581.

(i) 35 B. 169.

Son's liability when arises.—The son's pious duty to pay off his father's debts not contracted for illegal or immoral purposes, is a present liability annexed to both the father's and son's interests in the ancestral property and does not depend on the fact whether the father is alive or dead. (j)

His liability arises the moment the father fails to pay, (k) or the father's share in the joint property or his self-acquired properties are found insufficient to meet the debts. (l) It should be noted that there is no distinction between the father's and son's interest either in extent or character in ancestral property. (m) And accordingly an alienation of the family property either by private transfer by the father (n) or in execution of a decree (o) for the payment of the father's lawful debts, is binding on the son.

Privy Council on son's liability.—“Their Lordships summed up the propositions as follows :—

“(1) *The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity ; but*

“(2) *if he is the father and other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.*

“(3) *If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt it would not bind the estate.*

“(4) *Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.*

“(5) *There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.” (o)*

(j) 51 I.A. 129.

(k) 13 I.C. 530 (A).

(l) 46 M. 64; 53 I.C. 231 (N);

34 C. 735; 53 A. 860, 881.

H. L. 17

(m) See ante p. 109.

(n) 1 I.A. 321.

(o) 1 I.A. 321.

(o) 51 I.A. 129.

Clause (1). —When the family estate is alienated or burdened by the manager of the joint family consisting of the manager, manager's son and other co-parceners such as manager's brother or brother's son, the joint family estate shall not be available to the alienee or creditor of the manager, even to the extent of the manager's or his son's interest, unless the debt was for the purposes of the family. (p) This rule may very well apply in places where strict anti-alienation rule is followed. (q) But it is doubtful whether this rule is applicable in other places where alienation of undivided interest in joint family is allowed for valuable consideration. (r) Therefore, in these latter places, the manager's interest and that of the son may be available to the creditor after partition from the other co-parcener as is held in Madras (s) and Bombay (t) schools. These decisions seem to violate the rule laid down in *Clause (3)*; but *Clause (3)* is undoubtedly meant for those places where anti-alienation rule of joint-family property is strictly adhered to.

But the son's pious duty to pay his father's debt not tainted with immorality, remains unaffected, (u) though the estate cannot be affected by such alienation. If partition be effected among the co-parceners, the father's share as well as that of the son may be taken for father's pre-partition debt not tainted with immorality, if the debt was not barred by statute of limitation. *

Clause (2). —This clause refers to joint family consisting of the father and the son or sons only. In such a case the whole estate is available to the creditor in the execution proceedings, if the debt was not tainted with immorality. (v) The 'debt' in this *Clause* has been interpreted by some

(p) 55 A. 417. see *contra* 55 A. 283.

(q) *Ante pp.* 123-124.

(r) *Ante pp.* 123.

(s) 13 M. 47.

(t) 1930 S. 138.

(u) 53 A. 868, 872.

* See *post pp.* 133-134.

(v) 57 C.L.J. 580.

Courts to include liabilities ; and it is not limited to the liability incurred by the advancing of a sum in cash to the father. (w)

But if the joint family consists of persons other than the father and sons, then unless the debt was for the purposes of the family, the joint family property is not at all available. (x) But whether this is a universal rule to be applied everywhere, read notes on *Clause (1)* above.

On a comparison of this *Clause* with *Clause (3)* it appears that if the family consisted of the father and the son or sons and if the burden was a mortgage which was not for an antecedent debt, the estate is not available as a mortgage security, but it may be taken in execution proceedings under this *Clause* provided the mortgage was not tainted with immorality.

Clause (3). —The privilege contemplated in this *Clause* is of the father (y) and, therefore, unless the mortgage of the joint-family property made by the father as the manager of the joint family consisting of the father and the son or sons, was to discharge an antecedent debt, it would not bind the estate, (z) unless the mortgagee proves legal necessity (a) as contemplated in *Clause (1)*. But it cannot be said to be applicable in places where alienation of undivided interest in joint-family property for valuable consideration is allowed and, therefore, if the mortgage was not to discharge an antecedent debt and the mortgagee fails to prove legal necessity, the mortgage security would be enforceable with respect to his own interest. And it is so held in Sindh in a case governed by the Bombay school, where it is further held that a money decree may be passed against the son in order to enforce it against the son's interest in the joint property. (b)

(w) I.L.R. (1938) A. 58; 1934
Pes. 84; I.L.R. (1939) M.

422.

(z) 55 A. 417.

(y) 55A. 370, F.B.

(z) 1928 L. 101.

(a) 51 A. 136 F.B.

(b) 1930 S. 138.

The mortgagee is not to prove legal necessity if the mortgage was effected to discharge an antecedent debt, (c) and he is not to enquire as to the existence of legal necessity, if almost whole of the consideration money was for meeting an antecedent debt. (d)

In order to get rid of a mortgage effected by the father-manager for antecedent debt, the son is to establish the connection of the antecedent debt with immorality. (e)

It is not sufficient if a debt is merely proved to be antecedent unless the question of pressing necessity and the money being then due under the previous bond is proved. (f) But the Madras High Court. (g) disagreeing with the above decision of the Allahabad High Court (h) has held that the son is bound by the father's alienation for debt whether the debt was then demandable or enforceable or not. This view seems to be entertained in the Central Provinces. (i)

Clause (4). —The Privy Council, in a recent case, (j) reiterates the view laid down by it in *Clause (4)* in *Brij Narain's* case. A Full Bench of the Allahabad High Court has explained the significance of the fourth *Clause* in the above judgment of the Judicial Committee thus:

"We think that what their Lordships meant to lay down was that the two deeds must not be part and parcel of the same transaction, but that they must be distinct and separate not only in point of time but in reality. There must be dissociation in time as well as in fact. If at the time when the earlier mortgage transaction was entered into the latter one was not even in contemplation, the first will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee." (k)

Clause (5). —The son's liability to pay the father's debts arises as soon as his father fails to pay and it is not affected by the fact whether the father is alive or dead. (l)

(c) 1929 L. 397; 1937 M. 718.

(h) 21 A.L.J. 354.

(d) 50 A. I.

(i) 1930 N. 273.

(e) 50 A. I.

(j) 35 C.W.N. 1221 P.C.

(f) 21 A.L.J. 354.

(k) 49 A. 123.

(g) 52 M. 856.

(l) 55 A. 417.

Antecedent debt of other than father.—The principle of law as applied to the term *antecedent debt* is applicable in case of the father only and not in case of any other member; (*m*) and in the latter case legal necessity is to be proved. (*n*)

Conclusion on son's liability. —The father's creditor, therefore, is entitled to realise his debts not only from the father's undivided coparcenary interest in the ancestral property during his life, but also from the entire property inclusive of his and the son's interest, either during his life or after his death. So the result of these various decisions is that it is the son's pious duty to pay off the father's debt unless he proves that it was contracted for illegal or immoral purposes, no matter, whether the debt was contracted for the benefit of the family or not, or the father is alive or dead or he was the managing member of the family or not.

But the son is not liable for claims against father's criminal act. (*o*)

Insolvency of father. —On the insolvency of the father the son's interest in the joint family does not vest in the Official Assignee but it may be made available for payment of the father's just debts. (*p*)

Suit against son alone when father alive. —But no suit for the enforcement of payment of the father's debt against the son alone can be instituted so long as the father is alive and the family undivided. (*q*)

Extent of son's liability. —The son's liability is limited to the extent of ancestral property inherited by him. (*r*)

Remedy against extravagant father. —It would seem that partition is the only remedy by which a son may now protect his interest from the liability of paying off the debts

(*m*) 55 A. 370; *Clause (3)*

(*p*) 52 I.A. 22; 49 M. 849 F.B.
above. (*q*) 40 M. 581.

(*n*) 1928 N. 151.

(*r*) 20 A.L.J. 969.

(*o*) 61 I.A. 350.

of an extravagant father ; but this remedy would be effective only against debts incurred after the partition, as after partition there are no assets of the father in the hands of sons.(s) It is, therefore, held that the sons' shares allotted to them on partition is liable for the father's pre-partition debt. (t)

Sub-Sec. v—Mother's debts

The mother's own debts are not binding on the father's estate. (u)

Sub-Sec. vi—Grandfather's and great-grandfather's debts

The rule which binds son with liability to pay his father's debts, extends equally to grandsons and great-grandsons, (v) but not the rule of *antecedent* debt. (w)

Sub-Sec. vii—Debts not binding on heirs

Debts not binding according to texts. —Father's debts not payable by the son were as follows :—(1) debts due for spirituous liquor, (2) for lust, or (3) for gambling, (4) unpaid fines, (5) unpaid tolls, (6) useless gifts or promises without consideration or made under the influence of lust or wrath, (7) debt for being surety, (8) debt by or for trade and (9) debt that is not *Vhyavaharika* or lawful, usual or customary. But these have been considerably modified by case-law.

Useless gift. —The Mitakshara on the text of Yajnavalkya, explains "useless gifts" to be gifts promised to an imposter, westler, flatterer, or the like.

Suretyship. —The sons (x) or the grandsons (y) are

(s) 51 M. 361; 13 P. 7; 1933 L. 857.

(v) 53 I.A. 204.
(w) 55 A. 370.

(t) 51 A. 932; 51 M. 361; 40 C. 407; 52 B. 376; 1929 O. 466 F.B.; 14 L. 399, 403; 14 P. 732.

(x) 39 C. 843; 38 M. 1120; 19 N.L.R. 29; 52 A. 153; 1935 B. 174.

(u) 50 A. 447.

| (y) 56 I.C. 962.

liable for the debts of the father or grandfather, incurred as a surety.

Vyavaharika. —Pandit Girish Chandra Tarkalankara has rendered it into “ necessary for life.” It is held by the *Bombay* High Court that a son is not liable under a decree obtained against the father for damages caused by the father’s wrongful, though not illegal, act in erecting a *Dam* obstructing passage of water to the plaintiff’s property ; the son could not be held answerable for the liability incurred by the father, from which the family estate derived no benefit. (z)

The *Calcutta* High Court did not accept Pandit Giris Chandra’s view and rendered *Vyavaharika* as equivalent to *lawful, usual or customary* ; so in a case like the last-mentioned *Bombay* case, the *Calcutta* High Court has held that sons are bound to pay the father’s debt. (a)

The *Lahore* High Court, agrees with the *Calcutta* view. (b)

The *Madras* High Court, (c) dissenting from the above *Bombay* case, and following the decision of the *Calcutta* High Court, has held that *Avyavaharika* debt means a debt *opposed to good morals*.

The *Oudh* Chief Court interprets *Avyavaharika* to mean a debt *not supportable as valid* by legal arguments and on which *no right could be established in a Court of law*. (d)

In the *Central Provinces* a debt is *Avyavaharika* if it cannot be recognized in a Court of law for affording relief. (e)

Immoral debts. —While explaining the text of *Yajnavalkya* the *Mitakshara* says,—“ that sons are not bound to pay to the wine-seller and the rest ”—i.e., to the winning gambler, to the mistress, and others. This explanation shows that there should be direct connection between the

(z) 32 B. 348.

(a) 39 C. 862.

(b) 8 L. 117.

(c) 35 M.L.J. 661.

(d) 1928 O. 10.

(e) 29 N.L.R. 107.

debt and the immorality exonerating the male issue from the liability of paying the same. The mere proof or general evidence of immorality will not be enough, (f) unless some connection be shown, between the debts and the father's immoralities. (g) It must be proved that the particular debt was contracted for an immoral purpose. (h)

Sub-Sec. viii—Interest

Interest.—Sons and grandsons also are liable to pay interest on father's and grandfather's debts. (i)

The rate—of interest must be relative to the time and place where the money is borrowed, the kind of security offered, the possibilities of realising such security, the supply of capital and the opportunities of finding persons willing to lend ; and the whole terms and conditions of lending are to be regarded together. (j)

Damdupat.—The rule of *Damdupat* is that the interest exceeding the amount of the principal, cannot be recovered *at a time* though the total amount paid from time to time may far exceed the principal. This rule of law is not applied to the whole of India. It applies to matters of contract (k) and only to cases where the parties or the debtors are Hindus. (l) But a Hindu by assignment of a debt in his favour from a non-Hindu (m) or a non-Hindu by similar transfer from a Hindu (n) cannot enforce this rule against the creditor.

This rule is applied to the Presidency of *Bombay*, (o) the Province of *Berar*, (p) and *Sindh*, (q) *Santal Pargana*

(f) 24 C.W.N. 938; 1928 M. 226; 1933 P.C. 38.

(g) 8 L. 632; 1938 A. 437.

(h) 17 C.W.N. 124 P.C.; 53 B. 777; 50 A. t.

(i) 53 I.A. 204.

(j) 55 I.A. 85.

(k) 49 C.L.J. 335. P.C.

(l) 21 C. 840; 21 B. 85.

(m) 21 B. 38; 1927 N. 249.

(n) 35 B. 199.

(o) 24 B. 305; 41 I.A. 68.

(p) 17 N.L.R. 200.

(q) 2 S.L.R. 10.

(r) and the portion of the city of *Calcutta* within the jurisdiction of the Original Side of the High Court. (s) It did not apply to the Presidency of Bengal outside the area mentioned above, (t) but it is now made applicable to *Bengal* by Act VII of 1933. This rule is not applicable in *Madras*. (u)

The rule of *Damdupat* only exists so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree. (v)

Sub-Sec. ix—Limitation

Limitation. —The son's pious duty to pay the father's debt will be barred by limitation, if not enforced within six years under Article 120 of the Limitation Act (w) from the moment the debt incurred by the father matures. (x)

Son's liability for barred debts. —Some Courts hold that it is a pious duty of the son to pay off the time-barred debt of his father, (z) while others entertain a contrary view. (a)

Renewal of barred debts. —The sons are liable to pay the time-barred debt acknowledged by the father, (b) that is, if the father revived the debt and made himself liable, the sons are bound by it. (c)

Soc. 8—JUDICIAL PROCEEDINGS

Sub-Sec. I—Suits

Personal and representative capacity. —The ordinary general rule is that no person can be bound by a decree to which he is not a party, it cannot even be used as evidence

(r) 5 P. 135.

(s) 23 C. 899.

(t) 2 C.W.N. 603.

(u) 31 M. 250.

(v) 63 I.A. 114.

(w) 42 C. 1068.

(x) 27 C. 762.

(a) 110 P.W.R. 1914; 16 O.C. 185.

(u) 33 M. 398; 5 P. 746.

(b) 44 A. 628; 50 M.L.J. 144;

16 O.C. 185.

(c) 46 A. 775; 30 N.L.R. 351; 9 P. 843.

against him. But this rule is not followed in all cases in which the managing member alone was the party to a suit: sometimes he is held to represent the whole family, and sometimes not so.

Suit by or against manager.—The managing members of a joint-family business can maintain (*d*) a suit against debtors in their own names without joining all the co-parceners. When, however, the other members of the family are minors, then the manager who is the *de facto* guardian of their interests must necessarily represent the whole family, and may alone sue. (*e*) The result is that the managing member can sue and be sued in a representative capacity so as to bind the entire family with the decree.

Suit against father.—The father of the family stands on a different footing from that of a brother or an uncle, and cannot be presumed to act in fraud of his son and, therefore, he may, in a judicial proceeding, be deemed to represent the family consisting of himself and his male issue. (*f*) The Privy Council in the case of *Mt. Nanomi Babusain* (*g*) explained the law on the subject.

Res judicata.—A suit, by other members of a joint family, is barred by the principles of *res judicata*, (Explanation vi of Section 11 of the Civil Procedure Code) if in the previous suit by the managing member, the manager acted on behalf of himself and representing the minor members' interests also and if the other members were adults, with their assent. (*h*)

What passes in execution against father alone.—The Judicial Committee held that the entire family property passed in execution of a decree against the father alone. (*i*) The Privy Council has held that in a sale in execution of a

(*d*) 38 I.A. 45.

(*e*) 54 I.A. 112.

(*f*) 53 B. 444; 52 A. 1027; | 1928 L. 484; 21 N.L.R. 38.

(*g*) 13 I.A. 1.

(*h*) 54 I.A. 112.

(*i*) 13 I.A. 1; 15 I.A. 99; 16 I.A. 1; 17 I.A. 11.

decree against the father, the son's interest also passes unless the lender knew that the debt was incurred for purposes of immorality.(j)

The result of the decisions is not uniform. The *Allahabad*, (k) the *Madras* (l) and the *Patna* (m) High Courts, following the decision of the Privy Council, (n) have held that where a suit has been brought by or against the managing member in his representative capacity, it will not fail by reason of the other members not being made parties to the suit. The principle has been adopted in the *Central Provinces*. (o)

The *Bombay* High Court, on the other hand, seems to hold that all the members of the joint family are necessary parties to a mortgage suit. (p)

The *Calcutta* High Court holds that the other co-parceners are necessary parties to a suit for enforcement of a mortgage of the joint-family property. (q)

The *Privy Council* (r) has laid down: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound." On a consideration of the above Privy Council decision, the *Calcutta* High Court has held that, if the mortgagee had no knowledge of the existence of other co-parceners the decree will be binding against all. (s)

It is settled by a Full Bench that a money-decree or a mortgage-decree passed against the father alone, may, after his death, be executed against his sons as his legal representatives who are, however, entitled to raise under

(j) 52 I.A. 22.

(k) 34 A. 549 F.B.

(l) 35 M. 689.

(m) 2 Pat. L.J. 306.

(n) 38 I.A. 45.

(o) 9 N.L.R. 1.

(p) 40 B. 248.

(q) 41 C. 727.

(r) 41 I.A. 216.

(s) 21 C.L.J. 454.

Sec. 244 (now 47) of the Civil P. Code the question as to the lawfulness of the debt. (*t*) The law on this subject is now settled by the new Civil Procedure Code, Sections 50, 52 and 53 in which the view taken by the said Full Bench has been embodied.

Receiver. —A receiver may be appointed of the joint-family property mortgaged by the *Karta* of the joint-family when the debt was known to the adult members of the family and the money advanced was used for the family business. (*u*)

Letters of Administration —cannot be granted to the estate of a deceased member of a joint-family governed by the Mitakshara school of Hindu law. (*v*)

Compromise and family arrangement by father. —A consent decree, based on a compromise evidencing a family arrangement settling disputed claims set up in a previous suit instituted by the father alone, is held to be binding on the sons in a subsequent suit by them, (*w*) when no ground is established for setting it aside, nor is it shown to be unfair to them.

Family arrangement —is one arrived at by members of the same family in settlement of doubtful claims, *i.e.*, the dispute being composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned; The *Allahabad High Court* (*x*) has adopted the requisite of a valid family arrangement as: “a transaction between members of the same family which is for the benefit of the family generally, as for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or the saving of the honour of the family.” It should be

(*t*) 34 C. 642; 33 B. 39.

(*u*) 41 C.L.J. 203.

(*v*) Sec. 211 (*2*) Ind. Suc. Act; 61 C.L.J. 593; 7 R.

39, 42.

(*w*) 60 I.C. 524; 12 Bom. L.

R. 621; 37 A. 105.

(*x*) 50 A. 284.

an honest settlement of an existing dispute which must not be manifestly *ultra vires* of the parties to settle, (y) and " *bona fide* dispute " means nothing more than that each party must intend to press his claim to the property. (z) It is a settlement of doubtful claims or rather what the parties believed to be doubtful, (a) i.e. there must be some consideration. (b)

Sub-Sec. ii Burden of proof

Burden of proof.—There is no presumption that a debt contracted by a manager of a joint family was for the benefit of the joint family. (c) The *onus* of showing that a debt contracted by the manager of a joint family is binding on the family, i.e., that there was either necessity or benefit or proper enquiry or antecedent debt, is in the first instance on the person seeking to enforce its payment. (d)

In case of debt incurred by the father, the person seeking to enforce it against the sons, is to prove the debt (e) and it is for the sons to prove the immoral or illegal purpose for which the debt was contracted in order to escape liability. (f) The alienee is to prove that there was an antecedent debt for alienation by the father. (g) But when the antecedent debt is proved, the *onus* lies on the son to prove the immorality or illegality of the debt. (h)

The difference between the liability of a son and that of other co-parceners lies in the *onus*; the son is to prove the illegal or immoral nature of his father's debts, whereas, in the other case, the burden of proof is on the creditor to prove legal necessity. (i)

(y) 48 C.L.J. 489.

(z) 50 A. 284.

(a) 1929 L. 16; 1937 O. 433.

(b) 1936 N. 136.

(c) 8 L. 673; 1 P. 715; 34

A. 135; 3 O.L.J. 26.

(d) 47 A. 459.

(e) 57 I.C. 36.

(f) 17 C.W.N. 280; 47 A. 122; 2 L. 263.

(g) 26 M.L.J. 604; 5 Pat. L.J. 120; 63 I.C. 515.

(h) 25 M.L.J. 281; 2 Pat. L. T. 572; 7 O.L.J. 273; 31

A. 176; 1930 L. 130.

(i) 36 M. 325.

Rate of interest.—The mortgagee must show not only that there was necessity to borrow but that it was not unreasonable to borrow at such a rate of interest and upon such terms, and if this be not shown, the rate and terms cannot stand, even though the charge be upheld. (j)

The recital in the deed—by which the property is alienated cannot be relied upon for proving the existence of necessity. (k) "Recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. * * * But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance and cannot lightly be set aside. * * * To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time." (l)

Sub-Sec. iii—Limitation

Setting aside alienation. —*By guardian* : A suit to set aside an alienation of property made by a guardian is to be brought within 3 years from the date when the Ward attains majority under Art. 44 of the Limitation Act.

By Manager : In an alienation by the *Karta* or manager 12 years limitation will apply to set aside an alienation. (m)

By father : A suit to set aside an alienation of immovable property made by the father, is to be brought within 12 years from the date when the alienee takes possession. (n) .

(j) See ante p. 136; 46 I.A. 145; 50 I.A. 14.

(k) 36 A. 187.

(l) 43 I.A. 249.

(m) 28 C.L.J. 496.

(n) Art. 126.

Declaration that transfer not binding. —A suit by a son for declaration that a mortgage executed by the father in favour of persons who were already in possession of the mortgaged property is invalid, is to be brought within 6 years and is governed by Art. 120 and not by Art. 126.

Recovery of Property from co-parcener. —A suit, to recover immovable property by one member from another who is separate from him, is to be brought within 12 years when the possession of the defendant becomes adverse to the plaintiff *i.e.*, governed by Art. 144 if the property was never joint family property ; (o) but if it were a joint-family property and the suit was to enforce a share therein, Art. 127 will apply, *i.e.*, the suit is to be brought within 12 years from when the exclusion becomes known to the plaintiff.

Suit for account against manager. —A suit for account against the *Karta* of a joint-family is to be brought within 6 years under Art. 120. (p)

Acknowledgement of debt. —The manager of a joint family has the same authority to acknowledge as he has to create a debt. (q)

Adverse possession. —Mere residence elsewhere than the family residence without obtaining any expenses of maintenance, education or marriage and without even asking for them, do not constitute adverse possession ; (r) there will be no adverse possession until ouster of one by other. (s)

Sec. 9—DEVOLUTION OF MEMBER'S INTEREST

Accession, not succession on member's death. —It has already been remarked (t) that on the death of a member of a Mitakshara joint family his interest in its property lapses, the maintenance of his widow and maiden daughter

(o) 35 C.W.N. 438 P.C.

(r) 53 B. 699.

(p) 32 C.L.J. 25.

(s) 58 I.A. 106.

(q) 41, C.L.J. 535; 5 M. 169
F.B.

(t) *Anti p.* 88.

and the latter's marriage expenses being charged on the family property by virtue of their own rights therein. There is not, however, passing or succession of the interest from the deceased member to the survivors ; but, there is only accession to the latter's interests.

Joint tenancy and survivorship.—The members of a joint family governed by the Mitakshara law hold the family estate as joint-tenants. The joint-tenancy under the Mitakshara arises by the operation of the law of inheritance. (u)

Order in devolution by survivorship.—The undivided co-parcenary interest really lapses, but having regard to the benefit derived by the survivors at partition, the undivided interest may be deemed to pass in a certain order: it devolves on the male issue in the first instance ; on their default, it goes to the nearest male ascendant and the collateral descended from him ; and on failure of these, to the next male ascendant and his descendant ; and so on. This is true in a qualified sense only ; for, female members getting shares on partition, do take the benefit of survivorship together with the males, provided partition takes place when their shares also are augmented.

Suppose for instance, A and B are two brothers, having sons and ancestral property, then all of them are entitled to undivided interests in the property ; but the death of a member of A's branch will not, at partition, augment the share of B and his branch. Suppose again that A dies leaving a wife and three sons, then A's share may be said to devolve on the widow and the sons, should the latter make a partition ; if one of these sons dies before partition without leaving male issue, then his share may be said to devolve on his two surviving brothers and also on his mother, should the two brothers come to a partition during her life, otherwise on the two brothers only if they continue joint. It should be borne in mind that what is *co-parcenary interest*

during the joint estate becomes converted into and is called *share* only on and after partition, and also in contemplation of it. But so long the family continues joint the benefit of survivorship is enjoyed by all the members, male or female.

The result of a member's death may be stated thus : If he dies leaving male issue, he may be deemed to exist in them ; for certain purposes he may be deemed to exist also in his widow, so long as the family continues joint ; otherwise, excepting for the purpose of the maintenance of his widow and maiden daughter, if any, and the marriage of the latter, his existence may be ignored as regards the joint property, which continues to be enjoyed by the survivors as before ; and their rights are, on partition, determined in the same way as if the deceased never existed, except for purposes mentioned above.

But not such order as in succession. —Hence, although there is an order of devolution as between different branches, there is no preference given to any of the members of the same branch by reason of his being nearer in degree than another. For instance, if a family consists of three brothers and one of them dies leaving two sons and then another dies without male issue leaving the two fraternal nephews and one brother surviving him, then the surviving brother, though nearer, cannot claim the undivided one-third interest of the sonless deceased brother to the exclusion of the nephews who are more remote in degree. The sonless deceased brother's interest passes to the surviving brother and nephews ; and on partition between the uncle and the nephews, the joint property is to be divided into two equal shares, one of which is to be allotted to the uncle and the other to the two nephews. (v) It should be observed that, if the sonless deceased brother had been separate, the surviv-

(v) 29 I.A. 70.

ing brother alone would have taken his estate to the exclusion of the nephews.

Exclusion of female heirs and daughter's son. —The effect of the rule of devolution by survivorship is said to exclude the widow, the daughter and the daughter's son in all cases, if the member dies without leaving male issue. The widow, however, cannot properly be said to be excluded: for the subordinate or imperfect co-ownership acquired by her on her marriage, cannot reasonably be assumed to be destroyed by the husband's death, because its incidents cannot but be admitted to continue in the shape of the legal charge on her deceased husband's co-parcenary interest, for her maintenance, residence, and religious expenses, subject to which the same may be said to pass to male co-parceners. But by the Hindu Women's Rights to Property Act the widow on the death of the husband shall have the same interest as her husband had in the joint family from 14th April, 1937 when the Act came into operation.

Charges on undivided share passing by survivorship. —The maintenance of the widow and the maiden daughter of a deceased co-parcener, and the marriage expenses of the latter, and the funeral and *Sradh* expenses of the deceased are charges on his co-parcenary interest.

Illegitimate brother of a Sudra taking by survivorship.* —A *Dasiputra* or illegitimate son by a slave girl, is a co-parcener with his legitimate brother in the ancestral estate, and will take by survivorship: and this view has been upheld by the Judicial Committee. (w) There is "no warrant for extending the scope of the Privy Council ruling so as to hold that an illegitimate son is a co-parcener along with his father's uncles and cousins." (x) Hence he cannot inherit collaterally in preference to legitimate heirs. (y)

* pp. 96-97.

(w) 17 I.A. 128.

(x) 24 M.L.J. 271.

(y) 44 B. 185.

Can a female member take by survivorship. —A lawfully wedded wife or *Patni*, becomes from the moment of her marriage, the co-owner of her husband with respect to all his property ; and it is by virtue of this right, that she becomes entitled to a share at a partition between her husband and his male descendants, or at a partition between the latter. But she is not entitled to the right of survivorship as she is not entitled to a share in other circumstances, for instance, if her husband dies without leaving male issue.

Sec. 10—PARTITION

Sub-Sec. 1—Partition of joint property

What is partition ? —Partition, according to the Mitakshara, is the adjustment into specific portions, of divers rights of different members, accruing to the whole of the family property. Hence, a suit by a member of a joint family for declaration of title to specific share does not lie in the absence of partition being claimed. The word 'partition' or 'division' may be employed to mean either a division of interest or a division of possession, or both. In connection with the Mitakshara joint families, it means severance of interest and consequent defeasance¹ of survivorship.

An agreement never to partition —joint property is invalid and not binding even on the parties to it. (z)

At whose instance ? —*Male co-parcener* : Partition may take place under the Mitakshara by the desire of a single male member, the other members must submit to it. (a)

Alienee : An execution purchaser of a member's interest and a purchaser of the same for value in Bombay and Madras, are entitled to demand partition in right of that member. (b)

Sons : The son or the adopted son can demand partition. In the Punjab a son cannot enforce partition against

(z) 42 A. 30.

(a) 30 I.A. 139.

(b) 46 B. 28.

the father. (c) A son cannot in the life-time of his father, according to the Bombay High Court, sue his father and uncle for partition of such property, against the will of the father. (d)

But this view has been dissented from by the Madras (e) and Calcutta (f) High Courts.

Illegitimate son : cannot demand partition.

Father : The father, even against the consent of his sons, can effect partition of ancestral joint property.

Mother : She cannot enforce partition unless partition takes place at the instance of her sons.

Wife : She cannot claim partition.

Widow : the *widow of a predeceased son and that of a predeceased son of a predeceased son*, can claim partition, under the Hindu Women's Rights to Property Act if their rights accrued from 14th April, 1937 when the Act came into operation.

Minor member : A valid agreement for partition may be made during the minority of one or more of the coparceners. (h)

Necessary parties in partition suit. —All co-sharers are necessary parties to a suit for partition. But when partition is claimed between different branches, the heads of each branch of the family are necessary parties, but not their descendants. (i) A suit, however, for partition in which all the persons impleaded are not interested in all the properties, is not maintainable. (j)

Sub-Sec. ii—What constitutes severance

Expression of intention to partition. —The unequivocal or unmistakable signification or declaration by a member of a joint family of his fixed or determined intention to become

(c) 13 L. 455.

(d) 16 B. 29.

(e) 18 M. 179.

(f) 31 C. 111.

(h) 30 I.A. 139.

(i) 13 L. 483; see Sub-Sec. v below.

(j) 23 C.L.J. 231.

separate would be sufficient to effect his separation or division of his title and severance of his interest, although division of possession or partition, by metes and bounds of the joint property, be not made. It causes change in the status, and conversion of the title from joint-tenancy to tenancy-in-common, under the Mitakshara law. A separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. (k)

The essential idea in partition, is the division of the right to, or the severance of the interest in, the joint property: there may be separation in residence (l) and food without there being separation in estate (m) and, conversely there may be a division of right without there being any separation in food and dwelling. (n)

Mere living separate, (o) or even the enjoyment by different members of different portions of property (p) or the division of income for the convenience of the different members, would not amount to partition in the absence of intention. (q)

In *Appovier's* case, (r) the Privy Council held that actual partition by metes and bounds is not necessary for completion of division of right. The same view is repeated by their Lordships. (s) The conduct is an important factor. (t)

The word "division" in connection with a partition has double significance, *first*, the severance of the status that an intention to become divided has been clearly and unequivocally expressed by explicit declaration or by conduct; *secondly*, there is the partition or division of the joint

(k) 40 I.A. 40; 58 I.A. 220.

(l) 31 I.A. 10.

(m) 40 I.A. 40.

(n) 15 N.L.R. 165 P.C.

(o) 63 I.A. 397.

(p) 10 M.I.A. 490.

(q) 8 M.I.A. 66.

(r) 11 M.I.A. 75.

(s) 30 I.A. 139.

(t) 30 I.A. 1.

estate, comprising the allotment of shares effected by various methods. (u)

Filing suit how far effects severance. —The filing of a suit for partition amounts to separation. (v)

The *Judicial Committee* in the case of *Kedar Nath* (w) has held that no severance of joint status results when a member of joint family had filed a plaint claiming partition but afterwards withdrew it. But the same Board in a still later case, (x) says: "Their Lordships see no reason to depart from that view," meaning the view expressed in *Kedar Nath*, "although such a plaint, even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained: See *Girja Bai v. Sadasiva Dhundiraj* (y) and *Kewal v. Budh Singh*. (z)"

The *Madras* High Court (a) still holds that "mere filing of the plaint does not necessarily effect a final severance in status."

The *Allahabad* High Court expresses: "It is not necessary for us to say, definitely, in this case, whether the person making the demand for partition, may abandon it without the consent of the other members of the family, so as to enable him to continue to be a member of the joint family." (b)

The *Bombay* High Court holds that filing of a suit for partition effects severance unless it is withdrawn and parties agree to continue to be joint as before. (c)

Transfer of entire undivided share in Bombay and Madras. —In case of a sale of the entire interest of a coparcener, a severance of status takes place in *Bombay* and *Madras*.

(u) 54 I.A. 413.

(v) 39 M. 159; 1928 N. 193;
51 A. 1; 1929 B. 424; 17
P. 430.

(w) 37 I.A. 161.

(x) 52 I.A. 83.

(y) 43 I.A. 151.
(z) 44 I.A. 159.
(a) 52 M. 845.
(b) 51 A. 519.
(c) 1937 B. 202.

Renouncing one's interest —does not effect severance of jointness, but it extinguishes his interest in the estate. (d)

A marriage under the Special Marriage Act —effects severance of a member of a co-parcenary.

Conversion to another religion of a member effects —severance of a joint family. (e)

Insolvency of member —does not effect severance of joint family status. (f)

Sub-Sec. III—Account of joint estate

Partition and liability to account. —A manager is liable to render account and the extent of his liability has already been dealt with. (f1)

Sub-Sec. IV—Shares

Share of father's wife. —Each of the father's wives is entitled to a share equal to that of a son on partition, whether it takes place during the father's life (g) or after his death. (h) But the Hindu Women's Rights to Property Act amends the law so that in case of there being more widows than one, all the widows together get a share equal to that of a son. The widow can after this Act came into operations, i.e., the 14th April, 1937, enforce partition.

The share does not become her *Stridhan* so as to pass to her heirs on her death and not to that of her husband.(i)

She could not before 14th April, 1937 enforce partition, but she was entitled to get a share when partition took place at the instance of sons or male members, or when the interest of a single member was severed by execution sale ; (j) but

(d) 63 I.A. 397.

(e) 40 C. 407; 6 L.L.J. 84; 1930 A. 341; but see 2 Mys. L.J. 92.

(f) 58 M. 126.

(f1) See p. 118 *supra*.

(g) 8 C. 17; 52 A. 596; 4 Pat. L.J. 38; 1927 N. 55.

(h) 8 C. 537; 17 B. 271; 38 A. 83.

(i) 39 I.A. 121; see "Mother's share" in Ch. XII, S. 2, ss. iii *post*; Hindu Women's Rights to Property Act.

(j) 31 I.A. 10.

since that date when the Hindu Women's Rights to Property Act came into operation, the widow can enforce partition.

In Madras the father's wife was not entitled to a share, but only to maintenance ; (k) but the aforesaid Act gives her a share.

Widow of a predeceased son —shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son. (l)

Illustration:—If a man dies leaving a son, a predeceased son's widow and a son of such predeceased son, will son's widow inherit $\frac{1}{3}$ rd, and the son and the grandson similarly get $\frac{1}{3}$ rd each, or will the son get half and the grandson and the predeceased son's widow get $\frac{1}{4}$ th each? It seems that she shall get a share equal to that of her son if there be such a son. And this will be cleared if we take the case in which a man dies, leaving a son, a predeceased son's widow and two sons by such predeceased son. The son in this case will get half and the other two grandsons will get the other half. Therefore, it seems, she will get a share equal to that of her sons i.e. $\frac{1}{6}$ th. So, the son's widow in the instance given above will get $\frac{1}{4}$ th and not $\frac{1}{3}$ rd.

Widow of a predeceased son of a predeceased son,—similarly gets a share and the provision for predeceased son's widow shall apply *mutatis mutandis* to her. The share is to be worked out in a similar manner as in the case of a widow of a predeceased son stated above.

Grandmother's share.—A paternal grandmother, like the mother, cannot herself enforce a partition. In case of a partition amongst the grandsons only, after the death of her sons, she is entitled to a share, according to the

(k) 1927 M. 83.

| (l) Hindu Women's Rights to
Property Act.

Bengal (*m*) and the Bombay (*n*) schools. In a partition between father and his sons, the paternal grandmother is not entitled to any share, (*o*) except in Mithila. (*p*)

In cases of partition between her grandsons or between her sons and grandsons by her deceased sons, she is entitled to a share equal to that of her son. (*q*) The step-grandmother's position is like that of grandmother. (*r*)

In Bengal and Bombay schools, therefore, there is no difficulty in ascertaining the amount of share which she is entitled to. Her share is equal to that of a grandson. But when the partition is between her sons and grandsons of deceased sons, she may claim a share equal to that of her son and not grandson.

The share does not become her *stridhan*. (*s*)

Unmarried sister's share. —At a partition made by the sons after the death of the father, they must allot a quarter share to a maiden sister. (*t*) *The quarter share is ascertained in this way*: suppose the partition takes place between a man's three sons, two widows and two maiden daughters, then the property is to be divided into seven shares, and a quarter of one such share is to be given to each of the maiden daughters, and then the residue is to be divided equally between the sons and the widows. (*u*)

Calculation of shares, illustration. —A separated Hindu of Madras governed by the Mitakshara School died after 14th April, 1937 leaving him surviving his mother, 2 widows, 1 predeceased son's widow, 1 widow of a predeceased son of a predeceased son, 1 son, 1 grandson (a son of the aforesaid son's widow), another grandson (not a son of the aforesaid son's widow) and a maiden daughter. The shares

(*m*) 31 C. 1065.

(*r*) 9 P. 338; 3 A. 118; 23

(*n*) 39 B. 373; *see* 54 B. 417
(not under Mayukha).

N.L.R. 684.

(*o*) 34 A. 595; 54 B. 417.

(*s*) 4 Pat. L.J. 38.

(*p*) 4 Pat. L.J. 38.

(*t*) 20 W.R. 336.

(*q*) 50 A. 532; 9 P. 338.

(*u*) Mit. 1, 7, 5-8; 8 C. 537.

of the aforesaid persons are to be calculated in the following manner.

The mother of the deceased *i.e.* the grandmother gets a share equal to a son. (v)

Each of the widows get a share equal to that of a son; (w) but since the 14th April 1937 all the widows together get a share equal to that of a son.

The widow of a predeceased son gets a share equal to that of a son if there be no sons of hers ; (x) but she possesses a son and hence her share will be equal to that of her grandson.

Widow of a predeceased son of a predeceased son will similarly get a share equal to that of a grandson if there be no son of hers. (y)

The sons and each of the grandsons by other sons get equal shares—the grandson or grandsons getting a share which his or their father would have got. (z)

The maiden daughter gets a quarter share of that which a son gets. (a)

At first the property is to be divided equally into 7 shares: *viz.* 1 for mother, 1 for two widows, 1 for predeceased son's widow and her son, 1 for the son, 1 for the grandson, 1 for the widow of a predeceased son of a predeceased son and 1 for maiden daughter. The maiden daughter will get the $\frac{1}{4}$ th of $1/7$ th, *i.e.*, $1/28$ th share. The remainder *i.e.* $27/28$ th shall be equally divided among the following:—1 for the mother (grandmother), 1 for two widows, 1 for the predeceased son's widow and her son, 1 for the son, 1 for grandson and 1 for the widow of a predeceased son of a predeceased son. Therefore the grandmother gets $3/28$ th, two widows get $3/56$ th each; the predeceased son's

(v) See foot note (q) above.

(w) See "share of father's wife" p. 151 above.

(x) See foot note (l) above.

(y) See p. 152 above.

(z) See Distribution *per stirpes* and not *per capita* and Ch. VI, Sec. 1, Sub-sec. ii below.

(a) See foot note (t) above.

widow and her son will get $3/56$ th each; the son will get $3/28$ th, grandson will get $3/28$ th and the widow of a predeceased son of a predeceased son will get a share equal to that of her son, i.e., grandson of a deceased owner, and this grandson will get what his father i.e. the son of a deceased owner would have got ; consequently she will also get $3/28$.

Illegitimate brother's share amongst Sudras. —The half share to which an illegitimate son is entitled when partition takes place at the instance of, and amongst, the legitimate sons of a *Sudra*, is to be ascertained in the same manner as the quarter share of an unmarried sister, the principle being the same. (b)

Common charges on joint property. —Provision must be made before distribution for common charges such as the maintenance of a widow not entitled to a share, and of one who would have been a sharer but is excluded from inheritance by reason of some bodily deformity and the like, as well as of other dependent members of the family. The marriage is the last of the sacramental or purificatory ceremonies which a father has to perform on his child, hence provision is made for it when partition is made.

Distribution per stirpes not, per capita. —When a family consists of different branches, each of which is composed of unequal number of male members, then the division is to be made *per stirpes* and not *per capita*; if the common ancestor and his wife or wives are alive, then each of them is to get a share ; and there should also be as many shares as there are branches consisting of male issues descended from him, one share being allotted to the members of each branch collectively: should there be an unmarried daughter of the common ancestor she must get a quarter share. In this manner the partition is to be carried out. • This division by number of sons is called *Putrabhag*.

(b) 53 I.A. 32.

Succession *per capita* is the rule, and succession *per stirpes* is the exception, in each case the rule is based on special text. (c) The brothers' sons (d) when they inherit as nephews and daughters' sons take *per capita* and not *per stirpes*. The same rule applies in case of succession of first cousins. (e)

Acquired property and double share.—If any property is acquired by a member with small aid from joint funds, but through the special personal exertion of a member, then he is entitled to two shares. (f)

A member may renounce his share,—and this has the effect of extinguishing his interest for the benefit of all the other members.

Sub-Sec. v—Incomplete and partial partition

Partition not necessarily separation of all.—Partition may stop at the primary stage, that is to say, the members of each branch may, oftener than not do, remain joint while the branches become separate from each other. (g) Similarly, one member or one branch only may separate from the other members or branches, while the latter continue to live jointly as before. Hence partition or separation of one or some members is not incompatible with the jointness of the rest. The whole thing depends upon intention. The Judicial Committee has explained the law thus: “ there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining

(c) 17 B. 303, 305.

(f) 9 W.R. 61.

(d) 15 W.R. 70.

(g) 29 C.W.N. 757; 29 A. 93;

(e) 45 B. 296.

see 27 Bom. L.R. 426.

members of a joint family to remain united or to-unite must be proved like any other fact." (h)

The mere fact of continuing to live together and enjoy their property in common as before, affects the mode of enjoyment, but not the tenure of the property or their interest in it ; the intention to subject the property to a division of interest is not inconsistent with that mode of enjoyment. (i)

Partial Partition. —From what has been said it is clear, that there can be a partial partition in the sense of some members remaining joint notwithstanding the separation of the rest, also in the sense of some property being divided by metes and bounds and the rest not being so divided. (j) But it is unlikely that there should be a partial partition in the sense of there being a severance of interest as regards part only of the property, and not as regards the whole. (k)

It appears to be settled that a suit by a member will not lie for partition of a portion only of joint family property. (l)

When a stranger co-sharer of a portion of property belonging to a joint family, or when some only of the members are entitled to a portion, then a suit for partition of such portion only, would lie. (m)

The Judicial Committee has held that " it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family." (n) In the absence of a special agreement to hold the property as joint-tenants, the members will be presumed to hold such property as tenants-in-common. (o)

(h) 30 I.A. 130.

L.J. 393.

(i) 30 I.A. 139; 52 I.A. 83.

(m) 23 B. 597; 23 A. 216;

(j) 14 C.W.N. 221.

23 M.L.J. 64.

(k) 1929 R. 323.

(n) 11 M.I.A. 75; 45 M. 489.

(l) 39 C.W.N. 377; 1 Pat.

(o) 54 B. 616; 1937 M. 335.

Sub-Sec. vi—Re-opening partition

By after-born son.—A decree for partition made in a suit by a member of a joint family is *res judicata* as between all co-sharers, who were parties to the suit. (*p*) But if a male child was in the womb of its mother at the time of partition, who would have been entitled to a share had he been then in separate existence, and the child becomes born alive subsequently to partition, then a share is to be allowed to him by re-opening the partition already made; (*q*) but the birth of another son before the date of the preliminary decree but conceived after the filing of the suit, cannot diminish the other brothers' shares receivable at the date of the suit. (*r*)

A son adopted by a widow of a co-parcener after partition by the surviving co-parcener have a right to re-open the partition. (*s*)

Unfair and fraudulent partition.—A partition to which a member was not a party, or was inequitable, (*t*) or was brought about unfairly and fraudulently, (*u*) or which was made during the minority of a member and was unfair or prejudicial to his interests, may also be re-opened at the instance of such members in so far as he is concerned. (*v*)

Partition caused by mistake.—If through mistake or error, whether by accident or design, some portion of the joint property was excluded from partition, then the omitted portion is liable to partition, even if the error was not mutual; there may be re-opening of partition as well as of settled account. (*w*)

(*p*) 41 I.A. 247.

(*q*) 34 C.L.J. 323, 326-7.

(*r*) 48 M. 465.

(*s*) 9 M. 64; 55 M. 581; see
ante p. 69.

| (*t*) 1927 N. 350.

| (*u*) 52 A. 596.

| (*v*) 30 I.A. 139; 31 I.A. 10.

| (*w*) 13 C.W.N. 309.

Sub-Sec. vii—Limitation

Effect of partition and limitation.—After change in his status by partition, a member can no longer be deemed as agent or representative of the family, and cannot maintain a suit to recover a debt due to the family: if he does, the other members can recover their shares by suit against him, provided it be instituted within the period allowed by Art. 62, Art. 127 of the Limit. Act being no longer applicable.

Adverse possession. *—A member of a joint family in exclusive possession of any joint property cannot plead limitation upon the ground of such possession, unless he has asserted an exclusive title to the knowledge of the co-partners and his possession becomes adverse. The burden of proving these lies on him ; (x) but if partition is proved the burden will be shifted on the plaintiff to prove that partition took place within twelve years prior to suit or that he had been in possession within that period. Mere non-participation in the profits does not amount to exclusion. (y) The Calcutta High Court (z) has held in cases governed by the Dayabhaga school, that: “ In order to establish adverse possession by one tenant-in-common against his co-tenants there must be *exclusion* or *ouster* and the *possession subsequent* to that *must be for the statutory period.* * * * What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession ; but such non-participation or non-possession may in the circumstances of a particular case, amount to an adverse possession. Regard must be had to all the circumstances and a most important element is the length of time.”

* See ante p. 143 Adverse possession.” | (y) 24 M. 441.

(x) 25 B. 362. | (z) 47 C. 274.

Possession in order to be adverse must be *adequate* in *continuity*, in *publicity* and in *extent* during the *time necessary to create a bar* under the statute. (a)

Sec. 11—IMPARTIBLE PROPERTY

The following are not liable to partition :—

(1) The separate property of a member.

(2) Father's affectionate gifts.

(3) Certain moveables, though joint, used personally by the members severally, such as wearing apparel or ornaments given to a woman.

(4) Those that cannot conveniently be divided, e.g., a reservoir of water, the common pathway, the place for worship and pasturage. (b)

(5) Those that are impartible by custom, such as a *Raj* or a principality.

Sec. 12—EVIDENCE AND PRESUMPTION

Sub-Sec. i—Evidence

Evidence of partition.—The evidence of partition may be: (1) documentary evidence, (2) oral evidence and (3) circumstantial evidence. The circumstances in each case are to be taken into consideration in determining whether there has been a partition.

Sub-Sec. ii—Presumption

Having regard to the peculiar feature of Hindu joint family system certain presumptions arise which are indicated here.

Jointness.—The relations that may naturally be members of a joint family are joint ; (c) any one alleging separation must prove that fact. (d) The strength of this presump-

(a) 62 I.A. 40.

(b) 36 B. 379.

(c) 1938 L. 204; 1938 A. 342.

(d) 52 I.A. 83.

tion varies in different cases; presumption of union is stronger in case of brothers than in case of cousins,—it becomes weaker and weaker as the family descends further and further from the common ancestor. (e)

Continuance of jointness.—If it is admitted or proved that a family was once joint, there arise a presumption in favour of the continuance of jointness, (f) and separation after that period is to be proved by him who alleges it. (g)

Partition.—If a partition is proved, the presumption arises that there was a complete severance. (h) Where a partial partition is admitted or proved, the presumption would be that there has been a complete partition. (i) So also when one member of joint family separates, there is no presumption that the remaining members remained united. (j)

Mere living separate or the enjoyment by different members of different portions of property or the division of the income for the convenience of the members or separate acquisition of property by members, would not by these, amount to partition in the absence of intention to separate or in the absence of any evidence of any actual division.

Nucleus.—There can be no presumption that a joint family had a nucleus, or any joint property. (k) A dwelling house in possession of either party is not a nucleus so as to clothe with the character of ancestral property to the subsequent acquisition by any of the parties; (l) nor any addition made to it raises the presumption of having nucleus. (m)

Mere existence of nucleus will not impress the acquisitions with the character of joint family property unless it

(e) 56 I.A. 13.

(j) 30 I.A. 130.

(f) 47 I.A. 57.

(k) 33 A. 677.

(g) 1927 P.C. 52.

(l) 1930 N. 225.

(h) 50 A. 180.

(m) 1929 L. 468.

(i) 55 M. 483.

H. L. 21

is shown that the acquisitions could be made out of the income. (n) The presence of considerable nucleus in the hands of a person raises a presumption that the properties in his possession are ancestral being acquired out of the nucleus. (o)

When the nucleus is insufficient, the burden of proof is upon him who asserts the acquisition to be joint property. (p)

Property in possession of a member.—The property in possession of any such relations is joint property belonging to all the members ; he must prove that it is his separate property, if he says so. (q) There is no presumption that a family, because it is joint, possesses joint property (r) and it is for him who alleges joint family property to prove it. (s)

Acquisitions in name of a member.—Any property purchased in the name of such a relation is joint property, (t) provided there be a nucleus of joint funds wherewith the purchase might be made, (u) but the presumption will be self acquisition, if he had sufficient means. (v) The presumption of joint acquisition will be rebutted if the ancestral assets were small in proportion to the value of the property acquired, (w) or the nucleus be not more than what is sufficient for the maintenance of the family. (x) If there be no nucleus, the presumption does not arise. (y) In a joint family the law is that while it is possible that a member may make separate acquisition and keep money and property so acquired as his separate property, yet the question whether he has done so, is to be gathered from all the circumstances of the case. (z)

(n) 65 C.L.J. 27; I.L.R. (1938) M. 696; 1937 C. 418.

(o) I.L.R. (1937) B. 708.

(p) (1937) I. M.L.J. 364.

(q) 47 A. 746.

(r) 1934 O. 475.

(s) 37 C.W.N. 420 P.C.

(t) 52 A. 961.

(u) 41 C.W.N. 613; I.L.R. (1937) M. 1012.

(v) 41 C.L.J. 374.

(w) 1928 L. 397.

(x) 49 I.C. 240 (N).

(y) 11 Luc. 302.

(z) 44 T.A. 201.

Presumption of purchase of property in the name of female member. —See Ch. XVI, Sec. 2, Sub-Sec. iv “ Benami purchase.”

Presumption as to acquisition by widow. —See Ch. XII, Sec. 5.

Presumption as to school of law and migration. —See *ante pages* 19-20.

CHAPTER VI

MITAKSHARA SUCCESSION

Sec. 1—SUCCESSION OF MALES

Sub-Sec. 1—Principles of succession

The law of succession —laid down in Yajnavalkya, applies according to the Mitakshara to the estate left by a male who was *separated* from his co-heirs and *not re-united* with any of them. (a)

Survivorship and succession. —It should be noticed that in a case of *succession*, a person acquires ownership in another man's property to which he had no right before the latter's death ; whereas, *survivorship* applies to property, to the whole of which the survivor had a right from before, and the death of a joint-tenant simply removes a co-sharer having a similar right to the whole, and thereby practically augments the pre-existing right of the survivor in some cases, but does not create any new right in him.

Death natural and civil. —According to Hindu law a person's ownership of property becomes extinguished by death *natural* or *civil*, and succession to his estate opens to his heirs. Civil death consists of (1) degradation on account of heinous sin for which the sinner becomes an outcaste, (2) adoption of a religious order, and (3) extinction of temporal affection. (b)

(a) See Mitakshara, 2, 1, 30.

(b) D. B. 1, 31.

Succession under Special Marriage Act. —The Special Marriage Act III of 1872 as amended by Act XXX of 1923 provides that marriage may be celebrated between persons each of whom professes any one or the other of the following religious persuasions, namely, Hindu, Buddhist, Sikh or Jain religion. But succession to the property of such persons and their issues shall not be governed by Hindu law but shall be regulated by the provisions of the Indian Succession Act.

The **order of succession** —is founded on two Slokas of Yajnavalkya and is moulded by the joint-family system, the normal condition of the Hindu society. All male relations are heirs in their order ; and the primary classification for the purpose is into *Gotrajas* or gentiles or agnates, or those connected through males only, or members of the same family, and into *Bandhus* or cognates, or those connected through a female, or those belonging to a different family. The former, however distant, are preferred to the latter with a single exception introduced by the fiction of interpretation in case of a daughter's son.

The *Gotrajas* are divided into two groups, namely, *Sapindas* and *Samanodakas*, of whom the former succeed in preference to the latter.

Proximity of relationship is, upon the authority of the text of Manu, propounded as the principle on which the order is to be worked out ; but it has not been completely worked out, so the Courts will have to do it following the analogy of the order such as is given in the Mitakshara. The Privy Council (*c*) has held " that under the Mitakshara, whilst the right of inheritance arises from *Sapinda* relationship or community of blood, in judging of the nearness of blood-relationship or propinquity among the *Gotraja*, the test to be applied to discover the preferential heir is the

(c) 42 I.A. 208; 48 I.A. 349; 58 I.A. 372.

capacity to offer oblations." But it is held that in Mithila the doctrine of spiritual benefit has no application. (d)

Women, as a general rule, are excluded from inheritance save and except such as have been expressly named as heirs. But this rule of exclusion has been departed from by the Bombay High Court by recognizing agnate female *Sapindas* as heirs, and by the Madras High Court by recognizing the right of female relations to succeed as *Bandhus*. In Bombay the widows of *Gotraja Sapindas* succeeding as heirs take in their interest as *Gotraja Sapindas* and so inherit *per capita* and not *per stirpes*. (e)

Whole and half-blood.—The preference based upon connection by whole blood, applies to all collateral relations of equal degree. (f)

Succession per stirpes and per capita.—The male issue again takes *per stirpes*, and not *per capita*; suppose a man dies leaving two grandsons by one pre-deceased son, five grandsons by another perdeceased son, and one great-grandson being the son of a pre-deceased grandson by a third pre-deceased son, then his estate is to be divided into three equal shares, one of which is to be allotted to the two grandsons by one son, another to the five grandsons by another son, and the remaining one to the single great-grandson descendend from the third son.

It should be borne in mind that the division *per stirpes* applies only to the male issue in the male line; all other heirs take *per capita*; for instance, if the succession goes to the daughter's sons, or the brother's sons, then if one daughter or brother leaves one son another three sons, and a third five sons, the estate is to be divided into nine shares, one of which is to be allotted to each of the daughter's or brother's sons.

(d) 7 P. 820.

(e) 1930 B. 390.

(f) 58 I.A. 372.

Makkathayan and Marumakkathayan law.—The former is a system of inheritance by sons as distinguished from the latter, a system of inheritance by daughters prevalent in some parts of the Madras Presidency. (g)

Kumaun custom—abrogates the Mitakshara law of inheritance whereby on failure of male issue, the inheritance is to be traced from the male ancestor of the deceased on the principle of representation. (h)

Determination of heir among Gotraja Sapindas.—Excepting in the case of the owner's son, grandson and great-grandson, the son and grandson of the male ancestor is to be exhausted before the next line in order comes in. But except in Bombay, the Privy Council in a case governed by the Benares school, and the Allahabad and the Madras High Courts, have held that the great-grandson like that of the owner is also to be exhausted before next in order may come in. (i)

Only three degrees are to be reckoned and not seven degrees in a branch, and after the third degree in one branch, the three degrees in the next collateral branch is to be considered and so on. (j)

New mode of succession—contrary to law cannot be prescribed by any person. (k) Any attempt to alter the law of succession for all times, even by agreement is unenforceable and invalid. (l)

From the Mitakshara the following order of succession noted by figures against the heirs is deduced. The modification of the order of succession by case-law or by legislation, is also indicated at proper places.

Sub-Sec. II.—Order among Sapindas

I-4, Separated son, grandson and great-grandson,—inherit together ; but when the Hindu Women's Rights to

(g) 1929 M. 509.

(j) 53 M. 61.

(h) I.L.R. (1939) A. 122.

(k) 18 W.R. 359; 47 A. 186.

(i) Post pp. 169-170.

(l) 1921 P. 353.

Property Act come into force from 14th April 1937, they along with **the widow, the widow of a predeceased son and widow of a predeceased son of a predeceased son** inherit together. If the male issues were joint and undivided with the deceased, they would take even his self-acquired property by survivorship and not by succession.

Right of representation.—The right of representation obtains amongst the divided male *issues*; hence, a grandson by a pre-deceased son, and a great-grandson whose father and grandfather are both pre-deceased, succeed together with a son.

These heirs take *per stirpes*.

The lawfully wedded and loyal wife.—In default of the male issue, the *Patni* or the lawfully wedded wife succeeds, provided she was loyal to the husband. The condition of loyalty or chastity applies to the wife only, and not to the other female heirs; her subsequent unchastity does not divest her estate.

The widow inheriting the husband's estate, does not become absolutely entitled to it, but takes only what is called the *widow's estate* in the same. On her death it goes to her husband's next heir, and not to her heirs.

Two or more widows take in equal shares, but since 14th April, 1937 all the widows together get a share equal to that of a son; on the death of one, the surviving widow takes her share.

The Hindu widow's estate lasts *durante viduitate*; her re-marriage, will divest her of the deceased husband's estate whether she marries according to Hindu rites or not. (m) Mere unchastity in the absence of remarriage will not divest. (n)

5. Daughters.—Hindu Women's Rights to Property

(m) See, Ch. XII, Sec. 3, Sub- | (n) 7 I.A. 115.
Sec. iii. |

Act has placed the daughter after the widow of the predeceased son and the widow of a predeceased son of a predeceased son. In default of the widow, the daughters are heirs ; of them, one who is unprovided, takes in preference to one who is provided ; on her death the provided daughter succeeds to the exclusion of the deceased daughter's son. (o)

In Mithila an unmarried daughter is preferred to a married one but there is no distinction between daughters who have or likely to have issue and those who have no issue or are not likely to have any issue. (p)

A daughter has been held to take only a *widow's estate* ; (q) on her death it goes to her father's heir ; (r) a surviving daughter will take what is left by a deceased daughter. (s) In the Presidency of Bombay, however, a daughter taking property from her father, inherits it as *Stridhana* or absolute estate and not *widow's estate*. (t)

Unchastity of a daughter is no ground for exclusion from inheritance. (u)

6. Daughter's sons. —In default of daughters, their sons take the inheritance of their maternal grandfather ; they take *per capita* in equal shares.

7. Mother. —After the daughter's son, comes the mother, or the adoptive mother. Unchastity does not exclude her from inheritance, nor re-marriage. (v) She also takes a *widow's estate*. (w)

Step-mother. —She is not in the line of succession at all ; (x) but she is an heir in Bombay. (y)

8. Father. —After the mother comes the father ; but he takes in the reverse order according to the Bengal school.

(o) 32 A. 314.

(u) 4 B. 104.

(p) 7 P. 820.

(v) 5 M. 149; 29 B. 91; 26 C.W.N. 925; 33 A. 702.

(q) 28 C.W.N. 1050 P.C.

(w) 56 B. 164.

(r) 6 I.A. 15.

(x) 37 C. 274; 37 M. 286.

(s) 32 A. 314.

(y) See *post p.* 175.

(t) 54 B. 323.

9. Brothers —of the whole blood take to the exclusion of half-brothers. In default of the former, the latter take.

10. Brother's sons. —In default of both full and half-brothers, the succession devolves on the brother's sons ; of them, a full brother's son will take in preference to a half-brother's son ; and they take *per capita*, as there is no right of representation. (z) In the country governed by the Mayukha, however, the sons of a brother who is dead, share along with surviving brothers, the estate of another deceased brother, (a) and this rule does not go beyond brothers and brother's children. (b)

Brother's son's sons. —The Allahabad High Court has held that the brother's son's son should be placed just after the brother's son. (c) The Privy Council has held that: “ In the Mitakshara as expounded in the Benares school, the word *Putra* or its synonyms employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense, as in the case of the deceased owner, and that the descendants in each ascending line up to the fixed limit, at any rate to the third degree, should be exhausted before making the ascent to the line next in order of succession. (d) The Madras High Court seems to conclude that the above Privy Council decision is binding on it. (e) But a Full Bench of the Bombay High Court has come to the conclusion that the compact series of heirs ends with brother's son and does not include the brother's grandson. (f)

The Privy Council in an appeal from the Patna High Court has again applied the extended meaning of the term *Putra* in the case of cognates also. (g)

(a) 50 A. 904.

(d) 42 I.A. 208.

(a) 49 B. 282.

(e) 53 M. 61.

(b) 29 I.A. 70.

(f) 54 B. 264.

(c) 24 A. 128.

(g) 48 I.A. 86.

11. Paternal grandmother—does not include step-grandmother.

Sister—was not an heir, but in Bombay was placed here; but by Act II of 1929 she is placed after the paternal grandfather, which however, did not alter the Bombay law. (h)

12. Paternal grandfather.

The following four relations are made heirs by the Hindu Law of Inheritance Act (II of 1929) and placed in the order here:—

(a) **Son's daughter** gets a *widow's estate*.

(b) **Daughter's daughter** gets a *widow's estate*.

(c) **Sister** gets a *widow's estate*. Half-sister is not included in the order. (i)

(d) **Sister's son**, but not the sister's adopted son made after her death.

13. Paternal uncle.

Daughter-in-law—is an heir in Bombay and Berar and placed here. (j)

14. Paternal uncle's son

His son—in the Benares and the Madras (?) schools and not in Bombay. (k)

15. Paternal great-grandmother

16. Paternal great-grandfather.

17. Paternal grand-uncle

18. His son.

His son's son—in the Benares and the Madras (?) schools but not in Bombay school. (k)

19-30. Similarly, and in the same order, the paternal grand-parents of^t the 4th, 5th and 6th degrees in ascent.

(h) 57 B. 377.

(i) 1938 M. 364; 11 Luc. 148;
55 A. 725.

(j) 1927 N. 86; 54 B. 219.

(k) See p. 169 above.

Other *Sapindas* and their two (or three) (*k*) male descendants.

Then come the remaining *Sapindas*; (*l*) the order in which they take is not stated, but is to be gathered by analogy from the foregoing order; it appears to be as follows :—

31-33. The deceased's male descendants, if any, of the 4th, 5th and 6th degrees in descent, beginning with the great-great-grandson. These must be separated from the deceased; for if they were joint and undivided with him, then they would take by survivorship in preference to all other heirs.

34-37. The father's 3rd, 4th, 5th and 6th descendants beginning with the fraternal nephew's son. (*m*)

38-41. The paternal grandfather's 3rd, 4th 5th and 6th descendants beginning with the paternal uncle's son's son.

42-57. Similarly and in the same order, should come the 3rd, 4th, 5th, and 6th descendants in the male line of the paternal great-grandfather and of his father, grandfather and great-grandfather: *the descendants of the nearest ancestor must come before those of a remoter ancestor*; and of these descendants, *the nearer in degree will take in preference to one more distant*.

Sub-Sec. III—Order among Samanodakas

58-203. The *Samanodakas* come after the *Sapindas*, they are thirteen descendants of the deceased himself, his thirteen ascendants and thirteen descendants of each of these thirteen ascendants,—all in the male line: (*n*) from these the *Sapindas* are to be deducted, then the remaining 147 relations come within the term *Samanodakas*.

The order of succession is to be governed by two principles, namely,—

(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

(*k*) See p. 169 above.

(*l*) Mit. 2.5.5; 13 M.I.A. 373.

(*m*) 24 A. 128.

(*n*) 40 M. 654; 1918 P.C. 49.

(2) Amongst the descendants of the same ancestor the nearer excludes the more remote.

Sub-Sec. IV—Order among Bandhus

Bandhus —or cognates come after the agnates. The *Sapindas* belonging to a different *Gotra* are included by the term *Bandhu*. Hence, the *Bhinna-gotra Sapindas*, who are, according to the Mitakshara, included by the term *Bandhu*, may be taken to mean any relation, however distant, belonging to a different family whose relationship can be traced ; for the term *Sapinda*, wherever used in the Mitakshara, must be taken in the sense of one connected through the body. But the Privy Council has held that for the purposes of inheritance like those of marriage, the *Sapinda* relationship ceases with the seventh degree on the father's side and fifth degree on the mother's side. (o)

Case-law on Bandhus :—The Mitakshara (p) divides the *Bandhus* into three classes, namely: (1) one's own *Bandhus*, (2) the father's *Bandhus*, and (3) the mother's *Bandhus*, and enumerates nine relations as such, thus:—

One's own <i>Bandhus</i> are his own ...	$\left\{ \begin{array}{l} \text{Father's sister's son.} \\ \text{Mother's sister's son.} \\ \text{Mother's brother's son} \end{array} \right.$
Father's <i>Bandhus</i> are his father's	
Mother's <i>Bandhus</i> are his mother's	
Father's <i>Bandhus</i>	$\left\{ \begin{array}{l} \text{Father's sister's son.} \\ \text{Mother's sister's son.} \\ \text{Mother's brother's son} \end{array} \right.$
Mother's <i>Bandhus</i>	
Mother's brother's son	

The Judicial Committee held that the above enumeration is not exhaustive (q) and therefore the maternal uncle and the father's maternal uncle are *Bandhus* and, as such,

(o) 41 I.A. 290.

(p) 2, 6, 1.

| (q) 12 M.I.A. 448; 48 I.A.
349.

entitled to succeed. The Viramitrodaya, laid down that the term *Bandhu* comprises also the *maternal uncle* and the like, and the reason assigned is that it would be improper to hold that their sons are heirs, if they themselves, though nearer, were not so. (r) Two other relations not failing within the enumeration have been held by two Full Benches of the Bengal High Court, to be *Bandhus* and heirs, namely, the *sister's son* (s) and the *sister's daughter's son*. (t)

Principle of order among Bandhus. —Of the three classes of *bandhus*, the first class succeed in preference to the other two, and the second before the third. (u) The *first class* comprises relations connected through both the parents ; the *second*, through the father alone ; and the *third*, those connected through the mother only ; and that the relations of the first class are equal in degree but nearer than those falling under the second and the third classes who are all equal in degree, but differ in sides.

The following three rules (v) may be deduced from the above in cases of competition between *Bandhus* :—

(1) The nearer in degree on whichever side is to be preferred to one more remote.

(2) Of those equal in degree, one related on the father's side i.e., *ex parte paterna* is to be preferred to one related on the mother's side i.e., *ex parte materna*. (w)

(3) When the side is the same, the circumstances of one being related through a male and another through a female makes no difference.

The Privy Council has adopted the principle of oblation theory or the theory of spiritual benefit for the purpose of finding out the propinquity of rival claimants ; (x) but also held that the primary test in all questions of inheritance, particularly in the Benares school, is propinquity in

(r) Viramitrodaya, p. 200.

| (v) 48 I.A. 349.

(s) 10 W.R.F.B. 76.

| (w) 58 I.A. 372.

(t) 6 C. 119.

| (x) 48 I.A. 349.

(u) 18 I.A. 86.

blood. (y) The preference given to the mother over the father does not extend to the mother's *Bandhus*. (z)

As regards the preferential rights of different classes of *Bandhus*, "the right of succession amongst the three classes of *Bandhus* mentioned in the text, is governed by the propinquity of the class ; and accordingly that a *Pitri Bandhu* does not succeed until the classes of *Atma Bandhus* is exhausted, and a *Matri Bandhu* does not succeed until the classes of *Atma Bandhus* and *Pitri Bandhus* are exhausted." (a)

Sub-Sec. v—Order among other heirs

Preceptor, pupil. —When a man has no relation, then his Preceptor, (b) Pupil and Fellow-student are in their order, entitled to take his estate.

Fellow caste people. —In default of all these, the estate of a Brahmana goes to learned Brahmanas, and not to the King. The presonal law of the Hindus relating to inheritance, by which they are permitted to be governed, cannot apply when there is a total failure of heirs ; hence, this provision of Hindu law cannot have any force and prevent the Crown as the *ultima haeres* to take by escheat the property left by a Brahmana leaving no heir properly so called, namely, a relation. (c)

King. —But the estate of a man of any other caste escheats to the King.

Sec. 2—FEMALE HEIRS

In Benares and Mithila. —The above order of succession is according to the Benares and the Mithila schools, in which female relations, as a general rule, are excluded from succession, save and except the widow, the daughter, the

(y) 58 I.A. 372.

(z) 58 I.A. 372.

(a) 48 I.A. 86.

(b) 44 M. 704.

(c) 8 M.I.A. 529.

mother, the father's mother, and the paternal grandfather's mother.

In **Bombay** all the female *Sapindas* of the same *Gotra* are recognised as heirs and they are shuffled in among the male *Sapindas*.

In **Madras** certain female relations have been recognised as *Bandhus* and heirs. Accordingly, son's daughter, (d) daughter's daughter, (e) sister, and father's sister (f) have been held heirs and *Bandhus*.

The **Allahabad High Court**—also adopted and followed the above view of the Madras High Court, and held that in the absence of preferential male heirs, a daughter's daughter is heir to her maternal grandfather. (g) But it has subsequently been held by the said Court that women, not expressly enumerated as heirs, cannot inherit. (h)

The Punjab. —This view has also been upheld in the Punjab. (hr)

CHAPTER VII

RE-UNION UNDER BOTH SCHOOLS

Sec. 1—RE-UNION UNDER MITAKSHARA

Sub-Sec. 1—General discussion

What is re-union. —If two or more parceners after partition agree to annul the partition and to live together jointly as before, and make a junction of their property with the stipulation based on affection, that what is mine is thine and what is thine is mine, then they are called re-united and their status, re-union. Mere living together (i) in one residence without junction of estate is not re-union. (j)

(d) 14 M. 149.

(e) 17 M. 182.

(f) 13 M. 10.

(g) 22 A. 338; see Art II of
1929, *ante p. 170.*

(h) 28 A. 187; *ante p. 170.*

(hr) 34 I.C. 916; *but see ante p. 170.*

(i) 12 C.W.N. 687; 1933 N.
130.

(j) 37 C. 703.

Intention to re-unite (*k*) or that there was re-union (*l*) must be proved like any other fact showing that the parties intended to alter their status with all its incidents.

Who can re-unite under Mitakshara.—It should be observed that the advantage derived from being re-united is a personal privilege which cannot be claimed by the sons of the re-united co-parceners although living jointly ; for, re-union pre-supposes jointness and partition ; hence, a re-united co-parcener is one who had been originally joint, then separated and afterwards became re-united. (*m*) But it is now settled by decision that it is confined to father and son, brothers and paternal uncles. (*n*)

Onus.—The presumption is that the members of a Hindu family are joint unless the contrary is proved. But when a joint family is proved to have separated, the burden of proof is on him who alleges re-union. (*o*)

Effect of re-union.—The effect of re-union is to postpone the wife, the daughter and the daughter's son to a few of the agnatic relations. The legal incident of re-union again, that a brother succeeds in preference even to the parents, shows that nearness of relationship is not the criterion of preference ; but at the same time it shows that while the preference assigned to a brother cannot but be agreeable to the parents, it appears to be based on natural love and affection, as it excludes other remoter re-united relations such as the uncle or the nephew.

Survivorship among re-united.—It is thought by some that survivorship applies to the estate of re-united co-parceners. (*p*) It is held, however, that the re-united members of a Mitakshara family are not tenants-in-common but are co-parceners with right of survivorship *inter se* ; and the son

(*k*) 50 I.A. 192; 30 I.A. 130.

(*l*) 61 I.A. 257.

(*m*) 30 I.A. 130.

(*n*) 62 I.A. 16.

(*o*) 51 M. 977; 1929 A. 513.

(*p*) 17 C. 33.

of a re-united member will himself be a member re-united with the others. (q)

Sub-Sec. II—Order of succession

I-3. Son, grandson and great-grandson—inherit as is the ordinary case of succession, whether they are separated or re-united. A re-united son has a preferential right of inheritance to one who remains separate. (r)

4. Re-united whole brother.

5. Re-united half brother and a separated full brother jointly succeed; in default of the one, the other takes the whole. (s)

6. Re-united mother. 7. Re-united father.

8. Any other re-united co-parcener.

9. A half brother not re-united with the deceased.

10. The mother not re-united with the deceased.

11. The father not re-united with the deceased.

12. The widow. 13. Daughter.

14. Daughter's son. 15. Sister.

Subject to this modification, the succession goes to the *Sapindas*, the *Samanodakas*, the *Bandhus* and the rest, as in the ordinary order of succession, explained in Chapter VI.

Sec. 2—RE-UNION UNDER DAYABHAGA

The text of Yajnavalkya is explained in the Dayabhaga to mean that when there is a competition between claimants of equal degree, then if any of them is re-united and the rest are not so, the re-united parcener will take the heritage to the exclusion of those who are not so. (t) According to the Dayabhaga, the above texts do not lay down a different

(q) 33 M. 165.

(r) 22 B. 101; 9 N.L.R. 150;

32 M. 377. 382-383,

H. L. 23

(s) 1930 O. 336.

(t) 43 C.W.N. 937.

order of succession applicable to the estate of re-united coparcener.

The text of Vrihaspati is explained in the Dayabhaga to curtail the operation of the rule of preference on account of re-union, by limiting it to the three sets of relations mentioned therein,—namely, father and son, brothers and uncle and nephew.

The case law —appears to modify the law of re-union as laid down in the Dayabhaga, by holding that the privilege extends to the sons of the brothers who became actually re-united. (u)

CHAPTER VIII DAYABHAGA JOINT FAMILY

Sec. 1—MITAKSHARA AND DAYABHAGA

The Mitakshara —is universally respected and accepted as of the highest and paramount authority by all the schools, except that of Bengal where it is received also as of high authority yielding only to the Dayabhaga in those points where they differ.

Points of difference between Mitakshara and Dayabhaga, are as follows :—

1. Heritage according to the Dayabhaga means property in which a person's right arises by reason only of his relationship to the former owner, *on the extinction of his right* by natural death or civil death such as degradation from caste for the commission of a heinous sin, or renunciation and retirement from worldly affairs by the adoption of a religious order.

2. Right by birth is not admitted ; hence, heritage is in all cases *obstructed*, and never *unobstructed*.

3. Two or more persons jointly inheriting property become tenants-in-common, and not joint-tenants in any case.

(u) 1 Hyde, 214; 35 C. 721.

4. The Dayabhaga doctrine of the co-heir's tenure of joint heritage is, that each co-parcener's right extends to a fractional portion only of the inherited property, in other words, to that fractional share which should be allotted to him if there were an immediate partition made. Hence it differs from that of the Mitakshara, according to which the right of each co-heir extends to the whole of the property.

5. The legal incidents deduced from the doctrine are, that a co-sharer can alienate his share without the consent of the rest, and that survivorship cannot apply to the undivided share of a co-heir.

6. Partition accordingly means, manifesting or making known that unknown and unascertained fractional share, in which alone the heritable right of co-sharers arose when the succession fell in, and which was undetermined during the joint state. It is concisely stated to be splitting up of joint possession and assigning specific portions of the property to the several co-parceners."

7. As regards ancestral property, a son does not acquire an equal right during the father's life so as to compel the father to make a partition of it against his will. Partition of ancestral property can take place during the father's life only by his desire, and after the mother is past child-bearing. On partition of ancestral property the father is entitled to two shares, and not to a share equal to that of a son as under the Mitakshara ; but he cannot claim more than a double share.

8. The father making a partition of the ancestral property during his life is entitled to a moiety of a son's self-acquired property and two shares of any property acquired by a son with slight aid from the family funds, but principally through his personal exertion, that son getting two shares and the rest one share each.

9. The father may make an unequal distribution of his self-acquired property among his sons, and retain as

much as he chooses of such property, but not of ancestral property.

Dayabhaga law changed. —The author of the Dayabhaga is said to lay down the doctrine of *factum valet*. By an improper extension of this doctrine of *factum valet* our Courts of justice have come to the conclusion that the father is the absolute owner of the ancestral property, so that there is no distinction between a father's self-acquired and ancestral property as regards his right of disposing of the same either by an act *inter vivos* or by a Will, and that a son has no right except that of maintenance. (*v*)

Sec 2--NATURE OF JOINT FAMILY

Joint family in Bengal. —Although the joint family system which is the normal condition of Hindu society prevails in Bengal in the same manner as in other provinces, yet, according to the view taken by the Courts of justice with respect to ancestral property, there cannot be a real joint family consisting of father and sons during the father's life-time, inasmuch as, joint property which is the essence of the conception of joint family, would be wanting to make them joint. (*w*) Nor can there be, according to the modern view, a real partition during the father's life ; for, it must now mean neither more nor less than a gift of the property by the father to his sons. (*x*)

But when a son acquires property with or without the aid of the family property, then the father and his sons may be joint as regards such property. For, the father is, according to the Dayabhaga, entitled to a moiety of his son's acquisitions even when made without any aid of the family property, and two shares of such property when acquired with the aid of his estate, the acquirer being entitled to two shares, and each of the other sons to one share. (*y*)

(*v*) Tagore v. Tagore, 18 W.R. 359.

(*w*) 46 C.L.J. 175; 60 C. 1253.

(*x*) 31 C. 448.

(*y*) 13 C.W.N. 1133, 1137.

It is after the death of the father, that the sons may, agreeably to the modern view of ancestral property, really become members of a joint family. According to the theory of the Bengal school they become tenants-in-common, and not joint-tenants, in respect of the estate inherited by them from their father ; but still their interests remain common as long as the family continues joint, *community of interest* being the criterion of jointness in both the schools.

As regards what constitutes joint property, the enjoyment of the same by the members, the management of the same, the manager's powers and the presumptions, the law appears generally to be the same in the Bengal school as under the Mitakshara. (z)

Joint acquisition and throwing into common stock.—In the case of brothers, the Privy Council has held that if a member of joint family blends his self-acquired property with that of the joint family either by bringing his self-acquired property into a joint family account, (a) or by bringing joint family property into his separate account, the effect is that all the property so blended becomes joint family property. (b) But clear intention to waive his separate rights must be established and will not be inferred from acts done from kindness and affection. (c)

Sec. 3—PARTITION

Partition when and by whom made.—Real partition may take place only after the father's death. It may take place at the instance of a single co-sharer who has an interest in the family property according to the rules of succession that apply to all cases without any such distinction as there is under the Mitakshara, based upon jointness, separation or re-union.

(z) But see difference in 31 C. 448, and 7 C.W.N. 725. (b) 50 I.A. 173.
 (a) 44 I.A. 201. (c) 1929 C. 636.

If the owner dies leaving male issue surviving, then his son, a predeceased son's son, and a great-grandson whose father and grandfather are both predeceased, are entitled to the estate and may claim a partition.

Partition amongst the male descendants is to be made *per stirpes*, and not *per capita*.

Maiden sister. —When partition is made by sons after the death of their father, their maiden sister is not entitled to a quarter share as in the Mitakshara school, but only to maintenance until her marriage, and to the expenses of her marriage, which cannot exceed a quarter share where the property is small.

Mother's share. —When the sons left by a man are all full brothers, and their mother is alive, then if partition is made by them, she is entitled to a share equal to that of a son. (d) She is not entitled to any share so long as there is no partition ; nor can she claim a share if the partition suit is withdrawn. But if the father died on the 14th April, 1937 or thereafter when the Hindu Women's Rights to Property Act came into operation, the mother can demand partition.

The mother's share is liable to be reduced if she has received *Stridhan property* from her husband or father-in-law; this is to be done also under the Mitakshara.

But the step-mother, if any, is not entitled to any share, but to maintenance only.

Nature of mother's right in the share, —is similar to the *widow's estate*. (f).

Father's mother's share. —The paternal grandmother is also entitled to a share at a partition by her grandsons. (g)

Maintenance of father's wives. —A person left three sons and one widow who was the mother of only one of these

(d) 57 C. 597.
(f) 15 C. 292.

| (g) 31 C. 1065.

sons, and there was a partition suit between them ending in a decree,—that the widow's maintenance *after* partition becomes a charge on the share of her son, and does no longer remain so on the entire estate; but she will get a share equal to that of a son and may demand partition from the date, the Hindu Women's Rights to Property Act came into operation. (h)

Sec. 4—ADVERSE POSSESSION

Possession of one tenant-in-common cannot be adverse to the other unless there was *ouster*; (i) or an equivalent of an ouster; (j) and it must be to the *knowledge* of the co-sharer. (k) Mere exclusive possession without more by a co-sharer does not constitute ouster. (l) The mere fact of living apart without enjoying any benefit out of the joint estate is no proof that there was the intention to exclude. (m) It is a question of fact, (n) and the burden of proof is on him who claims title by adverse possession. (o)

CHAPTER IX DAYABHAGA SUCCESSION

Sec. 1—GENERAL RULES OF SUCCESSION

Per stripes, per capita, right of representation. —The male issues take *per stirpes*; and as regards them, the *right of representation* obtains down to the third degree. (a) But the sons of different daughters as well as all collateral relations of equal degrees, take *per capita*. In their case the right of representation does not apply.

Birth before succession opens. —A relation claiming to be an heir must be in existence at the time when the suc-

(h) 16 I.A. 115.

(i) 58 I.A. 106.

(j) 50 C.L.J. 382.

(k) 34 C.W.N. 246.

(l) 51 C.L.J. 424.

(m) 53 B. 699.

(n) 50 C.L.J. 382.

(o) 1929 M. 27; see p. 143.

(a) See ante p. 165 "Suc-

cession *per stirpes* and *per*

capita" and p. 167,

"Right of representation."

cession opens : subsequent birth of a nearer heir cannot have the effect of divesting the estate already vested in a more distant heir. (b)

Preference based upon whole blood.—As the principle of propinquity is entirely ignored and the doctrine of spiritual benefit is deemed in modern decisions to be the sole criterion for deciding every question relating to inheritance in the Bengal school, it has accordingly been held (c) that a half-sister's son is entitled to inherit together with a full-sister's son, there being no difference in the amount of spiritual benefit conferred by them respectively. Upon the authority of this decision, the preference on this ground is to be confined to the nine collaterals among the first class Dayabhaga *Sapindas* (d) namely, a brother, an uncle, and grand-uncle, and their descendants; it will not apply to any other relations.

Re-union after separation is another cause for preference. It proves that the doctrine of spiritual benefit is not the sole criterion.

The effect of the operation of these two grounds of preference in the cases of brothers, nephews and uncles is as follows :—a re-united brother or nephew or uncle, of the half-blood, respectively, succeeds together with a brother or a nephew or an uncle of the whole-blood if the latter is not re-united ; the ground of one's being a relation of the whole blood is counterbalanced by that of the other's being re-united.

Inheritance of the preceptor, a pupil and a fellow student—has under the altered state of society become a thing of the past.

(b) 2 B.L.R. (F.B.) 103.
(c) 11 C. 69.

(d) See ante p. 28.

Sec. 2—ORDER OF SUCCESSION

The order of succession to the estate of the male is as follows :—

1-4. Son, grandson and great-grandson—in the same manner as under the Mitakshara ; but from 14th April 1937 when the Hindu Women's Rights to Property Act came into operation, the **widow** the **widow of a predeceased son** and the **widow of a predeceased son of a predeceased son, inherit together with them.**

Illegitimate son.—See pp. 96-97 *supra*.

Widow—must be chaste in order to inherit her husband's estate. (e)

5. Daughter : (i) first **Maiden** (2) and then **Married and having or likely to have male issue** ; a widowed sonless daughter, (f) a barren daughter, and a daughter who gives birth to female children only, are excluded from inheritance. The daughter takes a *widow's estate*. (g) An unchaste daughter is, according to the Dayabhaga, excluded from inheritance. (h)

6. Daughter's son—take *per capita*, and not *per stirpes*.

7. Father.

8. Mother, but not the step-mother. An unchaste mother is excluded from inheritance. (i)

9. Brother.—A full-brother takes to the exclusion of a half-brother ; and this distinction applies to all collaterals such as the brother's son, paternal uncle and the like. A step-brother comes before full-brother's son. (j)

10. Brother's son.—He whose father was re-united with the uncle, and who used to live jointly with his uncle

(e) 34 C.W.N. 648, 650-1.

p. 168.

(f) Mokunda v. Mon Mohini, 19 C.W.N. 472.

(i) 23 C.W.N. 970; but see p. 168.

(g) *Supra* p. 168.

(h) 38 C.W.N. 1095; but see

(j) 37 C.W.N. 329.

after his father's death, but who himself cannot be deemed re-united, is nevertheless entitled to inherit from the uncle in preference to a separated nephew. (k)

11. Brother's son's son.

12. Father's daughter's son. —The half-sister's son is entitled to take together with the full-sister's son, the capacity for spiritual benefit being the test. (l)

13. Paternal grandfather. **14. Paternal grandmother.**
15. Paternal uncle. **16. Paternal uncle's son.** **17. Paternal uncle's son's son.** **18. Paternal grandfather's daughter's son.**

19. Paternal great-grandfather. **20. Paternal great-grandmother.** **21. Paternal granduncle.** **22. His son.** **23. His son's son.** **24. Paternal great-grandfather's daughter's son.**

1st Note. —The following eight cognates have been shuffled in here by judicial decisions before the maternal relations, namely, (1) son's daughter's son, (2) grandson's daughter's son, (3) brother's daughter's son, (4) nephew's daughter's son, (5) paternal uncle's daughter's son, (6) paternal uncle's son's daughter's son, (7) paternal granduncle's daughter's son, (m) and (8) granduncle's son's daughter's son.

25. Maternal grandfather. **26. Maternal uncle.** **27. Maternal uncle's son.** **28. Maternal uncle's son's son.**
29. Mother's sister's son.

2nd Note. —Consistently with the above modification under the judicial decisions the following reciprocal maternal relations are to be placed here, namely, (1) the maternal great-grandfather, (2) his son, (3) grandson, (4) great-grandson, (5) and daughter's son (6) maternal great-great-grandfather, (7) his son, (8) grandson, (9) great-grandson, (10) and daughter's son, but not his son (n) and probably also

(k) 35 C. 721.
(l) 11 C. 59.

(m) 43 C. 1.
(n) 44 C.L.J. 470.

(11-16) grandsons by daughter, of the son and the grandson of the three maternal ancestors.

30-62. Sakulyas,—include the 4th, 5th and 6th descendants in the male line, if any, of the *propositus* himself, and of his father, paternal grandfather and paternal great-grandfather ; and they also include the three remoter paternal great-grandfather ; and they also include the three remoter paternal ancestors in the male line, namely, the paternal great-grandfather's father, grandfather and great-grandfather, and also six descendants in the male line, of each of these ancestors,—altogether thirty-three relations.

The order of succession amongst the *Sakulyas* appears to be that the descendants of the *propositus* come first, and then the descendants of his father, and then those of the next nearest paternal ancestor, and so on ; and that amongst the descendants of the same ancestor, the nearest in degree takes in preference to the more remote.

63-208. Samanodakas —are the same as under the Mitakshara.

The remaining Bandhus —such as the eight daughter's sons, and the seventeen maternal relations set forth in the *two Notes*, as well as the father's and the mother's maternal relations, and so forth, in the same manner as under the Mitakshara ; then—

Preceptor of the Vedas, pupil and fellow student in their order,—then*

Distant Sagotras of the same village, then—

Samana-pravaras of the same village, then—

Brahmanas of the same village, lastly—

The king —is the *ultima hœres*, but not of the estate of a Brahmana, which goes to the members of his caste.

* See ante p. 174.

Sec. 3—MITAKSHARA AND DAYABHAGA

Heirs under Mitakshara and Dayabhaga.—There is no difference between the two schools as to the persons that are heirs. To the question: who are heirs?—the answer is the same in both the schools; namely, relations, agnate and cognate, are heirs. But there is some difference as to the *order of succession*.

The term *Gotraja* in Yajnavalkya's text, according to the Mitakshara, is equivalent to *Sagotra* or a member of the same *Gotra* with the propositus. But the Dayabhaga explains the word to include cognates descended from a member of the *Gotra*, such as the daughter's son, the sister's son, the father's sister's son and so forth. And the word *Bandhu* which, according to the Mitakshara, signifies all cognates, is restricted by the Dayabhaga to cognate relations connected through the mother, the father's mother, and so forth. Thus Dayabhaga controverts the interpretation put on the texts of Yajnavalkya by the Mitakshara which postpones all cognates save and except the daughter's son, to agnates comprised by the terms *Sapinda* and *Samanodaka*.

The author of the Dayabhaga follows the analogy of the succession of the descendants of the *propositus* himself, in working out the order of succession among the three paternal ancestor's descendants and introduces their great-grandsons in the male line and their daughter's son, just after their son's son respectively. Thus, in addition to the daughter's son of the *propositus*, three other cognates are introduced, namely, the son of the daughter of the father, of the grandfather, and of the great-grandfather. And then reciprocally to these four cognate descendants of the family, four maternal relations are intended to be introduced by the author of the Dayabhaga, namely,

Maternal grandfather reciprocally to daughter's son.

Maternal uncle reciprocally to sister's son, and

Maternal uncle's son reciprocally to father's sister's son

and said uncle's son's son reciprocally to grandfather's sister's son.

Subject to this modification, the author of the Dayabhaga intended to leave the order of succession such as it is according to the Mitakshara which also is respected by the Bengal school as of high authority.

CHAPTER X

EXCLUSION FROM INHERITANCE AND DIVESTING

Sec. 1—CAUSES OF EXCLUSION

It should be remarked that sex is a cause of exclusion ; for, women are, as a general rule, excluded from inheritance and except such as have been expressly enumerated as heirs. The other causes of exclusion are certain moral or religious, mental and physical defects and deformities. They may be classified thus :—

Defects	1. Moral or religious	1. Irreligion or renunciation of religion. 2. Sins causing ex-communication or degradation, 3. Unchastity, 4. Addiction to vice, 5. Enmity to father, Enmity to propositus. 6. Adoption of religious order.
	2. Mental	
	3. Physical	

Defects	1. Moral or religious	1. Insanity, 2. Idiocy, 1. Blindness, 2. Deafness, 3. Dumbness, 4. Lameness, 5. Impotency, 6. Leprosy and 7. Other incurable diseases.
	2. Mental	
	3. Physical	

Sub-Sec. I—Moral and religious defects

Act XXI of 1850. —The renunciation of Hindu religion, and consequent excommunication are no longer causes of exclusion from inheritance, since the passing of this Act. It removes the disability of the person who renounces Hinduism ; hence, his Hindu son is entitled to inherit the property of his father who was converted to Mahomedanism, (o) but his non-Hindu descendants cannot claim any benefit under this Act. But the Allahabad High Court has held that a person who is born a Mahomedan, his father having renounced the Hindu religion, is entitled to inherit his Hindu paternal uncle's estate by Act XXI of 1850. (p) The Madras High Court (q) (dissenting) has held that the protection is given by the Act only to one person, the convert.

An important question is whether Act XXI of 1850 was intended to remove the disqualification based upon deprivation of caste by reason only of change of religion? or irrespective of the same? The Calcutta and Madras High Courts have held that the Act contemplates deprivation of caste by reason of change of religion and not for moral degradation. (r)

Re-marriage of widows and Act XV of 1856. —A widow who embraces Mahomedanism and then marries a Mahomedan husband, forfeits her rights in her Hindu husband's property under Hindu law and not under Section 2 of Act XV of 1856. (s)

Unchastity. —Unless condoned by the husband unchastity and disloyalty before the husband's death, according to the Bombay and Allahabad High Courts, would exclude the widow. (t) The Calcutta High Court dissented from this

(o) 27 I.C. 357 (S.)

(s) 41 M. 1078; 21 C.W.N.

(p) 11 A. 100.

906; *see contra*, 35 A.

(q) 40 M. 1118.

466.

(r) 35 C.W.N. 726, 730; 13

M. 133.

(t) 36 B. 138; 40 A. 178.

view. (u) But unchastity subsequent to the husband's death will not divest the estate already vested in her (v).

The Allahabad, Bombay and Madras High Courts have held that neither the daughter nor the mother is excluded by reason of unchastity which, as a cause of disinherison, applies to the widow alone. (w) But the Calcutta High Court has held that the condition of chastity applies not only to the widow but also to the daughter, (x) to the mother (y) and to all women. (z)

Unchastity, prostitution, degradation and tie of kindred.—A Full Bench of the Calcutta High Court, (a) has held that "the mere fact that a Hindu woman has adopted the life of a prostitute does not sever tie which connects her to her kindred by blood, and, that consequently, the *Stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law." It has been so held by some other High Courts. (b) The Patna High Court has, however, held that a prostitute is an outcaste and hence she retains her right of inheritance under Act XXI of 1850. (c) .

The succession to a prostitute's property is governed by the ordinary Hindu law of succession. (d)

The Sudder Court of Bengal and the Madras High Court (e) have held that in a competition between degraded and undegraded relations for the property of a prostitute, the degraded relation is preferred to the undegraded relation. A subsequent decision of the Madras High Court, (f) however, has preferred an undegraded relation to a degraded

(u) 34 C.W.N. 648.

(v) *Moniram v. Keri*, 5 C. 776

(w) 33 A. 720; 4 B. 104; 5 M. 149.

(x) 38 C.W.N. 1095.

(y) 30 C.L.J. 235.

(z) 22 C.W.N. 566.

(a) 40 C. 650.

(b) 48 M. 944; 29 A. 4.

(c) 3 P. 152.

(d) 29 C.W.N. 624; 48 M. 944.

(e) *Tara Munee v. Moti*, 7 S.D.A. 273; 13 M. 133.

(f) 38 M. 1144.

one. The Full Bench of the Calcutta High Court, however, has kept the question open. (g)

Unchastity and Stridhana. —Unchastity does not exclude a Hindu woman from inheriting *Stridhana* property. (h)

Enmity to the father. —A son who is habitually inimical to his father and beats him or otherwise ill-treats him is excluded from inheritance. Hence, patricide is excluded from inheritance. (i)

Enmity to propositus. —A participant in a murder is not entitled to inherit the estate of the person murdered by himself or with his aid, or at his instigation. (j) He (a son) is entitled to maintenance from the person excluding him from inheritance after serving out the punishment inflicted upon him. (k) The Madras High Court has held that a party to a murder is not entitled to any beneficial interest in the estate of the person murdered, although the vesting of it in him by inheritance is not prevented. (l)

Adoption of religious order. —Entrance to a religious order is tantamount to civil death so as to cause a complete severance of his connection with his relations as well as with his property, inheritance to which opens on his renouncing the world by the adoption of a religious order. But the renunciation must be complete and not nominal only, (m) as in the case of persons entering the *Vaishnava* sect in lower Bengal, called *Byragis* by name, but who, do not mean thereby to renounce worldly affairs and relinquish property. Such a *Byragi* is not excluded from inheritance (n) and his property passes on his death to his ordinary relations. (o)

(g) 40 C. 650, 674.

(h) 30 C. 521; 26 M. 509; 1 A. 46; 4 B. 140, 122.

(i) 17 C.W.N. 341.

(j) 51 I.A. 368.

(k) 17 C.W.N. 341.

(l) 27 M. 591.

(m) 18 C.W.N. 59; 1936 N. 186.

(n) *Teeluk v. Shama*, 1 W.R. 209.

(o) 15 W.R. 197.

Sub-Sec. ii—Mental defects

Idiocy and insanity.—In the *Dayabhaga* *Jada* or an idiot is defined to be a person not susceptible of instruction. It is a congenital and incurable mental infirmity, arresting development of the intellectual facilities.

Insanity is a disease of the mind which need not be congenital nor incurable to exclude from inheritance the person affected thereby at the time the succession opens. (*p*) The view as to whether a subsequent insanity divest a coparcener if the interest vested in him by birth, generally appears to be that such a person cannot claim partition nor can he get a share when partition takes place while his disability lasts. (*r*) But the Privy Council has not clearly indicated its view. (*s*)

Act XII of 1928.—The question of exclusion from inheritance due to idiocy and insanity, developing after birth has now, *excepting persons governed by the Dayabhaga school*, been settled by legislation, enacting that no person shall be excluded from inheritance or from any right or share in the joint family property by reason only of any disease, deformity or physical or mental defect.

Sub-Sec. iii—Physical defects

Defects of external organs of sense and of action.*

—Blindness (*t*) and deafness and dumbness (*u*) must be congenital, according to Manu. These defects must also be incurable. (*v*)

Leprosy and other incurable diseases.—It need not be

(*p*) 38 A. 117; 10 C. 639; 43 M. 464; 47 B. 707; see Act XII 1928 below.

(*r*) I.L.R. (1937) A. 825; 1920 N. 93; 43 M. 464; 1935 M. 775; 13 P. 712; 1936 B. 191.

H. L. 25

(*s*) 43 C.W.N. 814.

* In this connection see Act XII of 1928.

(*t*) 44 I.A. *229.

(*u*) 1927 B. 193; 1927 N. 235

(*v*) 23 W.R. 78; 1 B. 117; 18 C. 327.

congenital but it should be incurable, (*w*) and assume a virulent and aggravated type in order to operate as a cause of exclusion from inheritance. (*x*)

Act XII of 1928. —The law relating to physical defect has been amended by this Act. Read the notes on this Act given above.

Sec. 2—EFFECT OF DISQUALIFICATION

Exclusion not total. —From the texts it is clear that the persons that are excluded from participation of shares on partition are, with their wives and children, entitled to maintenance save and except one who is degraded and excommunicated and his issue born after his degradation.

Disqualification personal. —If the person affected by a disqualification, has a son or other descendant of his body, who would by right of representation take his place and inherit in case he were dead, then such a descendant will, if he is himself free from similar defects, inherit, notwithstanding the exclusion of his father or other ancestor. (*y*) This rule, however, does not apply to a son born to an outcaste after his degradation ; (*z*) nor to a son adopted by a disqualified person : nor to a son of a disqualified brother or other collateral, when there is another brother or collateral of the same degree, free from defects, as right of representation does not apply to collaterals.

Cure of defect and divesting. —The removal of the defect subsequent to the opening of the inheritance will not entitle the affected person to claim the heritage by divesting the person in whom it has already vested.

This rule cannot apply to Mitakshara family. —It does not require any defect to be congenital ; if the disqualification arises before partition, it will cause exclusion of the

(*w*) 1 B. 554.

(*x*) 38 M. 250; 22 I.A. 94; 50 C. 604; 48 B. 363 P.C.

| (*y*) 11 P. 35.

| (*z*) 2 B.L.R. F.B. 103.

affected person ; if again the disqualification is subsequently removed, he will be entitled to take his share by re-opening the partition, like a posthumous son.

It has been held by the Madras High Court that the after-born grandson is entitled to take his grandfather's undivided co-parcenary interest which may be said to have passed on his death by survivorship to his brother's descendants. (*a*) The Bombay High Court has taken a contrary view by holding that a grandson born after the death of the grandfather to his deaf and dumb son, is not entitled to take the undivided moiety of the grandfather which passed by survivorship to the latter's surviving brother and his son. (*b*)

Maintenance.—Excepting the outcaste, the disqualified persons are not really excluded from inheritance, but they do not get shares on partition of the family property, while they and their wives and children are entitled to get maintenance out of the property. The rule that persons who are excluded for causes other than degradation, are nevertheless entitled to maintenance applies also to women that are excluded by reason of their sex, or any other cause of disqualification other than degradation.

Sec. 3—EVIDENCE

The onus of proving disqualification —lies on the person who seeks to exclude one who would be an heir ; should no cause of exclusion be established, (*c*) the presumption of Hindu law would be against disqualification. (*d*)

CHAPTER XI *

MAINTENANCE

Sec. 1—LIABILITY FOR MAINTENANCE

Two-fold liability for maintenance, —one is limited

(*a*) Krishna *v.* Sami, 9 M. 64.

(*b*) 6 B. 616.

(*c*) 50 Cal. 604.

(*d*) 18 W.R. 375.

by his inheritance of the ancestral and other property, while *the other* is absolute and independent of such property and is determined by certain relationship.

Absolute liability.—A man is bound to maintain his aged parents, his virtuous wife, (e) and his minor children, whether he inherited any property or not. He is also bound to support his infant illegitimate child. (f)

Liability limited by inherited property.—There is no difference between the two schools as regards the view that the ancestral property is charged with the maintenance of the members of the family and that no alienation can be made which will prejudicially affect the support of the group of persons who ought to be maintained.

This view of the Dayabhaga has been departed from by the Courts of Justice, which hold that there is no distinction between ancestral and self-acquired property as regards the father's right of disposal over the same.

A widow in possession of her husband's estate—appears to be bound to maintain her husband's poor relations in addition to those already mentioned.

Sec. 2—WHO ENTITLED TO MAINTENANCE

Persons entitled to maintenance from ancestral property:—

1. All male members of the family, including those that are excluded from inheritance. (g)
2. Their wives or widows.
3. Their unmarried daughters.
4. Their married or widowed daughters when they cannot get maintenance from their husbands' family.
5. The dependent members or the poor relations whom the deceased proprietor used to maintain.

As regards the Mitakshara school there is no doubt as to the right of the persons under heads 1, 2 and 3, to maintenance out of ancestral property.

(e) 1927 M. 502.

(f) See Cr. P. Code, Sec. 488.

(g) 41 M. 778; see ante p. 195.

In the Bengal school, however, a doubt may be raised as to the right to maintenance of an adult son and consequently of his wife or widow and daughter.

Sub-Sec. I - Son, daughter-in-law etc.

Sons. —Adult sons and their wives and children are entitled to maintenance from the ancestral property in both the schools. (*h*)

Daughter-in-law. —Under the Mitakshara the daughter-in-law does, in right of her husband, acquire a right to the ancestral property, since her marriage. Where there is no ancestral property, a Mitakshara father-in-law is under no obligation to maintain his widowed daughter-in-law. (*i*) His obligation is merely a moral or an imperfect obligation which, however, ripens into a legal obligation on the part of the heirs who get his estate. (*j*) But where there is ancestral property (*k*) or self-acquired property treated as family property, (*l*) the daughter-in-law is entitled to maintenance out of such property. There is no difference between the two schools as regards the daughter-in-law's right to claim maintenance from the father-in-law who has only self-acquired property. (*m*)

The *Bombay* High Court holds that she cannot claim it against the universal legatee of her father-in-law's whole self-acquired property. (*n*) The *Madras* and *Allahabad* High Court hold that her legal right is not affected by testamentary dispositions made by the person morally bound to provide maintenance. (*o*)

The *Oudh* Chief Court has held that she is entitled to maintenance out of the property acquired by the father-in-law after the death of her husband and which is in the

(<i>h</i>) See above, pp. 109, 110, 180-181.	! (k) 32 I.C. 33 (Punj.).
(<i>i</i>) 37 M. 399.	(l) 32 I.C. 955 (M.).
(<i>j</i>) 19 C.W.N. 1169; 1926 L. 198; 1932 N. 11.	(m) 38 C.W.N. 262 P.C.
	(n) 25 B. 263.
	(o) 22 M. 305; 1929 A. 751.

possession of her husband's brother or the son of the latter either by right of inheritance or of survivorship. (*p*)

Hindu Women's Rights to Property Act gives the widow of a predeceased son and the widow of a predeceased son of a predeceased son, a share in the separate property left by the deceased owner if he died after the Act came into operation.

Sub-Sec. ii—Wife or widow

The right of the wife to maintenance from her husband is not lost even if the husband renounce Hinduism. (*q*) This right subsists even after the husband's death when his right passes by survivorship or by succession to sons or even to collaterals. (*r*) This right does not depend upon the widow's not possessing other means of support. (*s*) But the Calcutta High Court holds that a widow is not entitled to maintenance from her husband's co-parceners if she has got other source of income to support herself. (*t*)

From the date the Hindu Women's Rights to Property Act came into operation (14th April 1937) the widow is entitled to a share.

Her residence and maintenance. —The wife cannot live away from the husband and claim separate maintenance (*u*) except for such ill-treatment as would amount to cruelty. (*v*) But if the husband refuses to receive the wife into his house without sufficient cause, she is entitled to separate maintenance. (*w*)

A widow or other dependent woman has a right of residence in the family house and she cannot be ousted (*x*) except to satisfy claims which are paramount to her right

(*p*) 1929 O. 251.

P. 869.

(*q*) 6 A. 617. (*r*) 55 M. 752.

(*v*) 48 C.L.J. 171 P.C.

(*s*) 38 M. 153; 3 L. 55.

(*w*) 9 W.R. 475; 1936 M. 609.

(*t*) 4 C.L.J. 74.

(*x*) 1937 Pes. 46.

(*u*) 48 C.L.J. 171 P.C. 12

of residence or payment of debts not tainted with immorality (y) and unless some other place is provided for her. (z)

Precedence over her maintenance.—A debt contracted for family necessity takes precedence even over the widow's claims for maintenance. (a) But since the passing of the Hindu Women's Rights to Property Act, she gets a share in the property.

Unchastity.—An unchaste wife or widow (b) is not entitled to any maintenance from the husband or his heirs respectively. A widow is entitled to a starving maintenance only if she reforms her conduct. (c)

Re-marriage.—It has been held by the Allahabad High Court that when re-marriage is permitted by the customary rule of a caste, it does not disentitle a widow from recovering maintenance charged by a decree against the husband on his property. (d) This view appears to be contrary to the interpretation put by the Calcutta, Madras, Bombay, Patna and Lahore High Courts. (e)

Husband's liability, a charge on property.—When the husband is alive he is personally liable for the wife's maintenance which is also a legal charge upon his property. But after his death, his widow's right of maintenance becomes limited to his estate which, when it passes to any other heir, is charged with the same. (f) The Courts appear to hold that it is not so by itself, unless it is made a charge on the property by a decree. (g)

Sub-Sec. III.—Step-mother

After partition between her son and her step-sons, it

(y) 1930 L. 288; *see ante*

pp. 135-136.

(z) 43 M. 635; 1937 M. 193.

(a) 1936 L. 558.

(b) 39 A. 234; 62 I.A. 250.

(c) 56 A. 392; 49 B. 459; 39 M. 658.

(d) 55 A. 24.

(e) 50 C. 727; 41 M. 1078; 59 B. 417; 1 P. 706; 1930 L. 1023.

(f) 27 M. 83.

(g) 43 M. 800; 1934 S. 14; 1934 P. 99.

will be a charge only on the share of her son, and not on that of her step-sons. (*h*) The Madras High Court has held that the mother is entitled to have her maintenance from both son's and step-son's interest in the entire family property. (*i*)

Sub-Sec. iv—Daughters and Gharjamais

Unmarried daughters of the deceased proprietor are to be maintained by the heir until marriage, so also the unmarried daughters of disqualified members are to be so maintained.

A married daughter is ordinarily to be maintained in her husband's family. But if they are unable to maintain her, she is entitled to be maintained in her father's family. The Bombay High Court holds that an indigent widowed daughter who fails to get maintenance from her father-in-law's family and is supported by her father, is not entitled after his death to claim her maintenance from his heirs. (*j*) This view, however, is not approved by the Calcutta and Madras High Courts, (*k*) which hold that she must, in the first instance, look for her maintenance to her husband's family ; if she fails she can claim the same out of her deceased father's estate.

Son-in-law or Gharjamai.—*Vide ante pp. 51-52.*

Sub-Sec. v—Sister

The maintenance of an unmarried sister and the expenses of her marriage, (*l*) are charges on the brother's estate, especially when it was inherited by him from an ancestor.

Sub-Sec. vi—Dependent members

Poor relations and other dependent members whom a person used to maintain, as being morally bound to do so,

(*h*) 16 I.A. 115.

(*i*) 38 M. 556.

(*j*) 23 B. 291.

(*k*) 28 C. 278; 23 M.L.J. 223.

(*l*) 38 M. 556.

are after his death, entitled to maintenance from his heirs, (m) provided he left sufficient property. Under this head are included invalid adopted sons, concubines, illegitimate sons, and sons-in-law who are *gharjamais*. (n)

Sub-Sec. vii—Concubine and Illegitimate issue

Concubine.—See ante pp. 96-97.

Illegitimate son.—See Ante pp. 96-97.

Illegitimate daughter.—An illegitimate daughter of a *Sudra* is not entitled to maintenance out of the estate of her putative father.

Sub-Sec. viii—Junior members of imitable estate

The junior members of an imitable estate are entitled to provision for maintenance out of the property: See Ch. XV, Sec. 4.

Sec. 3—LEGAL INCIDENTS

Sub-Sec. i—Amount of maintenance

Wife's maintenance.—In determining the amount of maintenance no indulgence is to be shown to husband on the ground that he has married another wife. (o)

Widow's maintenance—is to be settled having regard to the *value of the estate*, to the *position and status* of the deceased *husband* and of the *widow* and to the same *degree of comfort and luxury* of life as in the *husband's life-time*.(p) Proper maintenance include not only ordinary *expenses of living* but also reasonable expenses for *religious and other duties* incident to the station in life which she might occupy. (q)

(m) See *Bholi v. Dwarka*, 84 I.C. 394 (N.)
I.C. 168 (Lah.).

(n) 23 M. 282; 47 B. 401; 32 C. 479; *Lingappa v. Esudasan*, 27 M. 13 & 32;

(o) 1935 L. 110

(p) 56 I.A. 182.

(q) 5 I.A. 55.

Other Dependents.—If a person be entitled to separate maintenance, then the question as to its amount will depend upon the *extent of the property*, (r) the *position of the family*, the nature of the *claimant's right*, the *number of other members* of the family and *other peculiar facts* of each case, (s) at the date of the suit. The widow of the undivided co-parcener cannot claim more than the proceeds of the share which would have been allotted to the husband, had there been a partition during his life-time. (t) The amount is not to bear any fixed ratio to the property: the sufficiency of the maintenance is the criterion. (u) The question of amount of bare maintenance can and should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. (v)

The maintenance charges include the right of residence, (w) and education and marriage expenses. (x)

Can amount be modified?—The amount decreed may be reduced or increased on a change of circumstances. (y) But if the rate was fixed by a compromise decree, (z) or settled by the husband and the wife, (a) the Court cannot alter it.

Other sources of maintenance.—If the claimant for maintenance is possessed of property yielding an income, that must be taken into consideration, (b) but possession of jewels by a widow cannot reduce the maintenance she is entitled to, (c) specially when she belongs to a community in which widows are not prohibited from wearing jewels. (d)

Arrears of maintenance.—In dealing with claims for

(r) 1930 M. 479; 1929 B. 452.

(y) 32 B. 486; 1926 S. 135;

(s) 5 I.A. 55.

1926 L. 539; I.L.R. (1939)

(t) 11 B. 199; 21 M.L.J. 706.

M. 234.

(u) 25 C.W.N. 403.

(z) 1928 M. 713; but see 11

(v) 49 B. 459.

Luc. 607.

(w) Charandas v. Nagubai,

(a) I.L.R. (1938) B. 1.

1927 B. 452; 1934 S. 14.

(b) 38 M. 153.

(x) 1926 P. 1.

(c) I.L.R. (1937) B. 113.

(d) 1925 M. 645.

arrears of maintenance, the Court cannot disallow or cut it down, (e) but it has discretion to grant, or withhold those arrears or determine the extent of the liability, (f) with special reference to the urgent need and necessities of the widow, which amounts virtually to saying that every such case must be decided upon its own facts. (g)

Sub-Sec. ii—Charge on property

The widow has no lien on her husband's estate in the hands of his heir for her maintenance ; it is only a claim against the heir personally. (h) Mere notice of the existence of her claim will not make the property in the hands of the purchaser liable, unless he had notice of the vendor's intention to defeat the claim for maintenance. (i)

But if a decree has been made in favour of the claimant charging certain property with maintenance then and then only it will be a legal charge on the property to whomsoever it may go. (j)

A widow, however, cannot set up her claim for maintenance against property alienated during the life-time of her husband. (k)

Interest of women in property for maintenance.—The property given to a woman in lieu of her maintenance does not become her *Stridhana* and so an alienation of such property by her will be operative during her life-time. (l)

Sub-Sec. iii—Transfer of maintenance

A right to maintenance being from its very nature a right restricted in its enjoyment to the claimant personally, cannot be transferred, (m) nor seized and sold in execution

(e) 1928 C. 196.

43 C.L.J. 604; sec. 39, Tr.
P.Act.

(f) 1937 M. 915; 1938 B. 321;

(j) 13 L. 419 4 A. 196; 1932
C. 451; 1937 M. 193.

1938 N. 198.

(g) I.L.R. (1937) B. 113; 1925

(k) 40 A. 96.

M. 795.

(h) 17 W.R. 433; 2 B. 494;

(l) 54 A. 366; 1925 P. 523.

see 63 I.A. 33.

(m) See Tr. P. Act. Sec. 6,

(i) 24 A. 160; 23 B. 342; see

Cl. (dd).

of decree. (*n*) But although the right to future maintenance is not liable to sale, yet arrears of maintenance may be sold. (*o*).

Sub-Sec. IV—Limitation

Lapse of time.—The Judicial Committee observe: “By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow ; and a Statute of limitation might much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.” (*p*)

Limitation applicable to a claim for maintenance is that stated in Arts. 128 and 129.

CHAPTER XII FEMALE HEIRS AND STRIDHANAM

Sec. 1—GENERAL OBSERVATION

Sub-Sec. I—Woman's rights

Women in ancient law.—Life-long subjection was the condition of women and they could not, according to early law, hold any property ; and consequently they could not become heirs to their relations.

Sub-Sec. II—Women's rights under Codes

Women's rights under the Codes.—To the general rule of women's incapacity to hold property exceptions appear to have been gradually introduced.

The following are the different items of *Stridhana* mentioned in the Codes:—

i. Gifts at the time of marriage of *Yautuka* ; they are—

(*n*) Civil P. Code, Sec. 60, (1). | (*o*) 11 B. 528.
(*n*). | (*p*) 6 I.A. 114, 118.

- (1) Gifts at the actual ceremony of marriage.
- (2) Gift received in her father's or father-in-law's house either before or after the actual ceremony.
- (3) *Sulka* or the bride's price.
- (4) The bridegroom's price.

II. *Adhyavahanika* consists of what is given to the bride when she is *conveyed* from her father's to her father-in-law's house. There are two occasions for such gifts: the *first* occasion is just after the nuptial ceremony, when the bride is taken to her father-in-law's house to stay there only a few days which are included under the time of marriage, so that gifts then made may be called *Yautuka*; the *second* occasion is called *Dwiragamana* or *second coming*, of the bride to her father-in-law's house after attaining puberty.

III. *Adhivedanika* or the gift which a husband is to make to a wife on the occasion of marrying another wife.

IV. *Anvadheyaka* or "gift subsequent" is a term used in contradistinction to *Yautuka* or gift at the time of marriage; it means and includes a gift made, or property received, subsequently to the marriage.

V. *Vritti* or subsistence or property given for, or allotted in lieu of maintenance; but it is not so held by the Courts. (a)

VI. Ornaments are *Stridhana* when they have been the subject of gift to her.

VII. Acquisitions of a woman by the practice of a mechanical art are subject to the control of the husband.

VIII. So also a present made to a woman by a stranger i.e., by one who is not a relation, belongs to her husband.

IX. Gifts by affectionate kindred, (b) *Saudayika* constitutes the peculiar property of woman which she is competent to alienate. (c)

X. As regards movable property given by the husband

(a) *Ante pp. 151, 182.*

(b) 39 M. 298.

(c) 57 B. 85.

she cannot deal with it according to her pleasure during his life time, but may do so after his death. The gift after marriage of property by the husband to the wife becomes her *Stridhana* of the kind known as *Anvadheyaka*.

Husband's gift of immovable property. — “ According to the Hindu law such property is taken by her as *Stridhan* and is descendible to her heirs and not to his (husband's) * * * but over such property, * * * she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her.” (d) This rule of Hindu law was an exception to the rule embodied in Section 95 of the Succession Act, (new) and in Section 8 of the Transfer of Property Act, namely, that in the absence of *express* reservation, the entire interest of the testator or transferor will pass respectively to the legatee or transferee. By the amendment of Section 2 of the Transfer of Property Act (XX of 1929) the whole of Chapter II of this Act in which Section 8 is included, has been made applicable to the Hindus and the Hindu law on this subject has thus been abrogated. Similarly, Section 95 of the Indian Succession Act (XXXIX of 1925) being made applicable to the Hindus, (*Vide* Sec. 57) the aforesaid rule now applies to the Hindus.

Sub Sec. III -Her right under commentaries

Woman's rights under Commentaries. — In the Commentaries higher rights are conferred on women who are placed almost on a par with men as regards the capacity to hold property.

The Mitakshara —says that the term *Stridhana* bears no technical meaning, but it signifies “ woman's property ” or property belonging to a woman, which is its etymological

(d) 50 A. 375.

meaning, (e) that the term "or the like" in that text, includes property that a woman may acquire "by inheritance, purchase, partition, seizure or finding," i.e., by the same modes in which a man may acquire property. The Mitakshara is clear and unambiguous, that *Stridhana* has no technical meaning, and women may hold property like men and that property inherited by a woman is her *Stridhana*.

Katyayana's text and Mithila school.—The Vivada Ratnakara while dealing with *Stridhana* cites the texts of Narada recognising the full power of a wife over the husband's gifts excepting immovable property; it then concludes that women are independent in dealing with property inclusive of immovables given by the affectionate relations, excepting, however, immovable property given by the husband.

Stridhana according to Dayabhaga.—The Dayabhaga appears to follow the Mitakshara and to hold that *Stridhana* or woman's property has no technical meaning.

Viramitrodaya and Smriti-chandrika on Katyayana's text.—The Viramitrodaya and Smriti-chandrika repeals the view propounded by the Mitakshara with respect to *Stridhana*.

Privy Council.—But the Privy Council held this doctrine to be erroneous by reason of its being in conflict with the texts of Katyayana who is recognised by the Mitakshara as a law-giver, though the text is not cited in the Mitakshara. (f)

Sec. 2—STRIDHANA

Sub-Sec. I—Case-law on Stridhana

Bengal.—According to the *Bengal*^{*} school a woman inheriting the estate of a male has a limited interest or what

(e) Mit. 2, 11, 8.

(f) 11 M.I.A. 488.

is called the *widow's estate* in both movable and immovable property.

Benares. —This Bengal doctrine has been extended to cases governed by the *Benares* school. (g)

Mithila. —According to the *Mithila* school the widow inheriting her husband's estate, either directly from him or mediately through her son, takes an absolute estate in the movables, (h) and a life-interest in the immovables in all cases. She is therefore competent to alienate the movables which will pass to her heirs on her death.

Bombay. —In *Bombay*, the *Mithila* rule seems to be followed to some extent. There the widow, the mother and the like relations becoming members of the family by marriage, are held to take a limited interest. (i) While the daughter, the sister, the brother's daughter and the like, who are born in the family, are held to take the estate absolutely. (j) The widow and the like appear to have an absolute power of disposal over the movables. (k)

Madras. —In *Madras* it has been held that the widow's power over the movables is not larger than over immovables. (l)

The *conclusion* is that the Bengal doctrine has been permitted to make a considerable inroad on the *Mitakshara* school.

Sub-Sec. ii—Stridhana Inherited by woman

The *Stridhana* inherited by female heirs does not become the latter's *Stridhana*. (m) The *Bombay* High Court has adhered to the decision held by it before, namely, a woman inheriting a *Stridhana* takes it as her *Stridhana*. (n)

(g) 1928 N. 93; 1928 A. 668. | (m) 30 I.A. 202 and 209; 43

(h) 47 I.A. 233.

C. 64; 1936 C. 34; 32 M.

(i) 36 B. 546.

521; 1928 L. 9.

(j) 34 B. 510; 9 M.I.A. 516.

521; 1928 L. 9.

(k) 16 B. 233. (l) 8 M. 304.

(n) 46 B. 17.

Sub-Sec. III—Property received on partition

The Privy Council has held that under the Mitakshara law, in the absence of any express contract to the contrary, the share obtained by a mother on a partition of ancestral property amongst her sons, does not become her *Stridhana* property. (o) The same view is entertained in the Bengal school. (p)

Sec. 3—WIDOW'S ESTATE**Sub-Sec. i—Nature of widow's estate**

(1) The widow may spend the whole income of her husband's estate ; and she is not bound to save a single farthing.

(2) But if she saves some income and invests these in the purchase of immovable property and *dies without making* a valid *disposition*, the same shall *pass to her husband's heirs*. (q)

(3) A widow in possession of her husband's estate is *not a tenant for life, but is the owner of her husband's property subject to certain restrictions on alienation* and subject to its *devolving upon her husband's heirs* upon her death. (r)

(4) Even without any necessity the widow may sell her husband's estate so as to pass to the vendee an interest in it for her life.

(5) She is entitled to do ordinary acts of management(s) and whether an act was in the ordinary course of business or not depends on the circumstances of each case. (t)

(6) The widow can, with the consent of the husband's next male heir for the time being, transfer any property appertaining to her husband's estate. It gives rise to a

(o) 39 I.A. 121 *see ante pp.*
182, 151.

mulation and acquisitions.

(p) 36 C. 75.

(r) 34 I.A. 87.

(q) *See post Sec. 5 "Accu-*

(s) 1927 N. 25.

H. L. 27

(t) 1927 A. 283.

presumption as to the existence of legal necessity for the transfer. (u)

(7) When the property is small and not sufficient for her lawful expenses, she may sell the whole of it.

(8) Although the widow's estate is a limited one, yet the only mode of preserving the future interest of the husband's heirs as provided by Hindu law, namely, the control of the husband's kinsmen over her management of the estate, is not ordinarily given effect to. (v)

(9) The result is that the widow is, subject to the restrictions relating to alienation, entitled to exercise the most absolute power of enjoyment over the estate which is entirely vested in her, and she represents the estate fully (w) as if the husband is alive in her (x) and no one else can have any vested interest in the succession so long as she is alive : unless she is guilty of wilful waste, she is not accountable to any one, (y) and she cannot be deemed to hold the estate in trust for reversioners (z) in any sense, and can deal with the property in such manner as is most beneficial to herself, irrespective of the question whether the same is prejudicial to the interests of the reversioners. (a)

It is thus described by the Privy Council in the *Unchastity case* (b) :—“ According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shivaganga* case—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. (c) Her estate is an anomalous one and has been

(u) See post Sec. 9 Sub-Sec. iv, “Alienation with reversioner's consent” under the heading “Reversioner”

(v) See post Sec. 6 “Waste.”

(w) I.L.R. (1938) B.292; I.L.R. (1938) A. 761; 68 C.L.J.

173.
(x) 63 C.L.J. 263 confirmed
43 C.W.N. 337.

(y) 37 A. 177.

(z) 60 C. 1236, 1250.

(a) 31 M. 153.

(b) 7 I.A. 115.

(c) See 49 I.A. 342.

compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The *succession does not open to the heirs of the husband until the termination of the widow's estate.* Upon the termination of the estate the property *descends to* those who would have been the *heirs of the husband* if he had lived up to and died at the moment of her death." The Privy Council again observed that a *widow's estate* "is neither a fee nor an estate for life, nor an estate tail." (d)

This anomalous *widow's estate* is what is taken by the female heirs in the estate of males according to the Bengal school. But that is not the view of the Mitakshara school, although the Bengal doctrine has improperly been extended to cases governed by the Benares school, and also by the Southern schools to some extent.

As regards the Mithila school its peculiar doctrine have not been overlooked ; and accordingly the *widow's estate* there, is such as has already been pointed out, (d) and differs materially from what is technically called the *widow's estate*.

Creation of widow's estate.—*Widow's estate* can be created by a Will or a grant, and can be acquired by prescription. (e)

Increasing widow's estate into absolute estate.—The widow does not get an absolute estate merely because no reversioner exists or because the person entitled to the estate does not claim it. (f)

Sub-Sec. ii—Compromise and settlement

When a widow inheriting her husband's estate enter

(d) 46 I.A. 72.

i M.L.J. 268, 273.

(d1) See p. 207 *supra*.

(f) 11 L. 503; 10 I.C. 51 (C).

(e) 48 M. 1; but see (1937)

into a compromise with her husband's co-parceners, according to the terms of which some property is assigned to her in lieu of her husband's undivided share, then whether she acquires an absolute title to the same or only a Hindu widow's estate therein depends upon the intention of the parties (g) to be gathered from the words of the document, looked at with reference to the parties who use them, and the quantity of the property assigned. (h) The property given to her may represent either her life-interest received in her personal character, or the husband's estate received in her representative character for enjoyment as a Hindu widow for life only. In the former cause the property would become the widow's *Stridhana*, the other party to the compromise being her husband's separated co-parceners and reversioners ; while in the latter, she would have only the widow's limited estate. (i)

Sub-Sec. III—Termination of widow's estate

By re-marriage. —The widow inherits her husband's estate in the character of being the surviving half of the husband ; when, therefore, the widow contracts a re-marriage, her right to the deceased husband's estate ceases. (j) There cannot be any difference between a re-marriage under the Act and a re-marriage under custom or one otherwise contracted, as regards its legal incident of divesting the widow of her deceased husband's estate. The Allahabad High Court and the Oudh Chief Court hold a modified view. (k)

By adoption. —When a widow adopts a son in the exercise of a power of adoption then also her interest in her husband's estate ceases ; but after the Hindu Women's Rights to Property Act came into operation, she seems to be divested of the half of the estate.

(g) 10 Luc. 35.

(h) 1936 P.C. 103.

(i) 36 I.A. 138.

(j) See *supra* p. 190.

(k) See *ante* pp. 58.

By surrender.—The widow's estate is also put an end to by surrender.

Sub-Sec. iv—Co-shares of widows

Two or more widows or other female heirs.—If a Hindu dies leaving two widows, they succeed as joint-tenants with a right of survivorship. (*l*) Although the joint female heirs may come to an arrangement whereby they may separately hold and possess portions of the property in proportion to their shares for convenience of enjoyment, yet there cannot be between them a legal partition or division of title, so as to defeat their survivorship, (*m*) or give an absolute estate in the share they obtain, (*n*) so as to enable one to alienate without the consent of the other. (*o*) But by agreement they can divide the estate to defeat the right of survivorship *inter se*. (*p*) But a co-widow has not an unqualified right to claim separate possession; it is discretionary with the Court to allow where separate possession appears necessary. (*q*) But such partition for the convenience of enjoyment cannot in any way affect the reversionary rights. (*r*)

One of the holders of the estate cannot without the concurrence of the other alienate any property even for legal necessity. (*s*)

In the Presidency of *Bombay*, the property inherited by daughters from their father becomes their *Stridhana*, and is held by them as tenants-in-common and there is no survivorship amongst them. (*t*)

The purchaser from one widow is entitled to enforce a partition as against the other widow, which should be carried

(*l*) 55 I.A. 399; 67 C.L.J. 115.

(*p*) 1925 M. 343; 10 N.L.R. 51
(*q*) 8 C.W.N. 658.

(*m*) 11 M.I.A. 487.

(*r*) 55 I.A. 399.

(*n*) 2 Pat. L.J. 578.

(*s*) 35 C.W.N. 279.

(*o*) 19 I.A. 184.

(*t*) 34 B. 510.

out in such a way as not to be detrimental to the future interests of the reversioners. (*u*)

The *Privy Council* in connection with the question, whether a transfer for legal necessity by one of two co-widows in separate possession of the estate left by their husband, is binding on the other widow, has held that when concurrence of the co-widow was not even applied for, the alienation is not binding on the estate. (*v*) An opinion, has, however, been expressed that "when the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed only by the corpus of the estate."

Sec. 4 ALIENATION OF WIDOW'S ESTATE

Sub-Sec. i.—Charge on widow's estate

Charges on inheritance.—There are certain charges on the inheritance, namely, the debts due by the deceased, the maintenance of certain persons already mentioned, the marriage of the unmarried daughter and sister and the like.

Liability how to be met.—The question arises whether she is bound to meet the charges for which the estate is liable from the income or is entitled to throw the burden on the corpus. It has been held that a widow is not bound to pay off the debts and the costs of marriage of maiden daughters from the income. (*w*) The widow's liability for rent, Road-cess or the like ought to be regarded as her personal liability and ought not to be held as attaching to the reversion, unless the tenure itself was sold under the special provision of the rent law or the like. (*x*) If she does not liquidate the husband's debts by the sale of a portion of the

(*u*) 9 C. 580.

(*x*) 30 I.A. 81; 29 C.W.N.

(*v*) 55 I.A. 399.

293 P.C.

(*w*) 31 C. 433.

corpus, she must pay the interest accruing due after the husband's death, from the income, (v) inasmuch as, the balance left after the payment of interest represents the true income to which she is legitimately entitled.

Sub-Sec. II—Alienation of widow's estate

The entire estate being vested in the widow, she is competent to deal with the same as a prudent owner would do. (z) As regards the management of the estate inherited by a widow or other female heir, her power has been held by the Privy Council to be similar to that of the manager of an infant's estate, by applying the principles of *Hunooman Parsaud Panday's* (a) case to alienation made by her. (b)

Necessity, for which the holder of a woman's estate can alienate immovable property, does not mean actual compulsion, but the kind of pressure which the law recognizes as serious and sufficient. (c)

Lease.—A permanent lease at a fixed rent granted by a widow, and found by the lower appellate Court to be for the benefit to the estate, is valid and cannot be set aside by the reversioner. (d) In the absence of legal necessity a permanent lease by a widow is not binding on the reversioner, (e) even if the rent reserved and the premium obtained were at the market value. (f)

Working mine.—She may work mines and quarries and fell timber, (g) unless her acts amount to destruction of property. (h)

Transfer of life interest.—A widow may sell her life-interest without any legal necessity, (i) and even for legal necessity life-interest only may be sold. (j)

(y) 55 M. 216.

(e) 47 C.L.J. 569.

(z) *Ibid.*

(f) 26 C.W.N. 322 P.C.

(a) 6 M.I.A. 393.

(g) 1929 O. 93.

(b) 8 I.A. 18.

(h) 22 M. 126; 1926 M. 641.

(c) 49 I.A. 342.

(i) 35 A. 311; 39 M. 565.

(d) 33 C. 842.

(j) 13 C.W.N. 353.

Sub-Sec. III—Legal necessity*

These are as follows:—

1. Payment of husband's debts.— being conducive to his spiritual benefit, she is justified in alienating for the purpose of paying off even debts barred by limitation, (*k*) or the debt of the father-in-law which her husband was bound to pay. (*l*) A mother, however, who succeeds to her son's estate as such, cannot validly pay off time-barred debts of her husband not charged on the property. (*m*)

2. Husband's exequial rites.—The performance of her husband's exequial right and that of his mother and the like are justifying causes for alienation. (*n*)

A daughter inheriting her father's property may alienate a portion of the property for defraying the expenses of her mother's *Sraddha*, or that of her father. (*o*)

3. Spiritual benefit of husband.—Religious or charitable purpose or purposes which are supposed to conduce to the spiritual welfare of the deceased husband, give a widow larger power of disposition than for worldly purposes, over the husband's estate. (*p*) Religious purposes, however, cannot be exhaustively enumerated. (*q*)

A pilgrimage to Gaya for performing the deceased husband's *Sraddha* or feasting Brahmanas in connection with such pilgrimage, according to the Calcutta High Court, (*r*) but not according to the Allahabad High Court, (*s*) is a religious purpose. The excavation of a tank and well (*t*) and construction of a temple and bathing *Ghats* (*u*) made for the performance of a work of recognised religious merit comes

* See ante pp. 114-115.

(*k*) 39 B. 113; 1930 L. 249; 16 P. 45; 57 C. 904.

(*l*) 1938 A. 100. *

(*m*) 43 A. 604.

(*n*) 32 B. 26; 1936 P. 80.

(*o*) 35 C.W.N. 279; 34 M. 288.

(*p*) 8 M.I.A. 526, 551; 43 C. 574.

(*q*) 44 A. 502, 512 P.C.

(*r*) 20 W.R. 187; 20 C.L.J. 285; 1928 O. 353.

(*s*) 33 A. 255; see 1938 A. 100.

(*t*) 10 P. 474; 43 C. 574; 10 P. 474.

(*u*) 1930 O. 225.

under the class of religious purposes. The Privy Council has laid down that an alienation by a widow of a small portion of her deceased husband's estate, for a continuous spiritual benefit of the husband, though not for an observance essential to his salvation according to Hindu religious law, is binding on the estate even when she had sufficient income for carrying out the object. (v)

A pilgrimage to Benares, or to Mathura, Brindaban, Rishikesh or Badrinarain, (w) or the gift even of a small portion of the estate unless it is for the benefit of her husband's soul, (x) or the installation of a deity or creation of an endowment, (y) is not a religious purpose.

The widow has no doubt got powers to alienate the husband's estate for purposes conducive to her husband's soul, but it must be within proper and reasonable limits. (z) But if the estate is small she can alienate the whole estate.(a)

4. Maintenance charges.—Maintenance for herself and of those who are entitled to it out of the estate, such as his mother, paternal grandmother, maiden sister, daughter, and the like are legal necessities. (b)

5. Marriage expense.—Marriage of deceased's maiden sister, daughter, her son, son's daughter, daughter's daughter, grandson's daughter or of relations such as these, is conducive to the husband's spiritual benefit. (c) The amount of expenditure to be incurred at a daughter's marriage must be reasonable. (d) Gift of an immovable property by the widow to her daughter at the *Gowra* ceremony is valid. (e)

(v) 49 I.A. 383.

(w) 9 C.L.J. 453; 46 A. 822; 1928 L. 875.

(x) 1919 Pat. 396; 41 A. 130; 1925 L. 2.

(y) 17 C.W.N. 782; 10 I.C. 230 (A); 43 A. 463.

(z) 42 B. 136, 154; 1933 A. 138; 1935 N. 217.

H. L. 28

(a) 49 I.A. 383; 12 P. 727.

(b) "Who entitled to maintenance" see ante p. 196.

(c) See ante p. 200; 1926 O. 425; 33 A. 255; 57 M. 272; 1935 L. 440.

(d) 1926 C. 486; 1933 O. 426.

(e) 37 C. 1.

A daughter inheriting her father's estate is competent to alienate the same to meet the expenses of her daughter's marriage, when her husband is not possessed of sufficient means to do so. (f)

6. Preservation of the estate—by payment of Government revenue and the like, justify an alienation (g) A sale of the *corpus* for payment of rent is not binding on the estate if there was no means of satisfying it. (h)

7. Costs of litigation, —but not frivolous litigation, respecting the estate such as are incurred for defending her title to it. (i)

Alienation proportionate with necessity.—There is a distinction between a mortgage and a sale, for while the exact amount actually necessary may be borrowed, there may not be any property the value of which is equal to the amount necessary to be raised, so that a sale often covers property of larger value, and is valid if the difference be not disproportionate. (j) The Privy Council has laid down that the real question is whether the sale itself was justified by necessity, and if the purchaser acted honestly and made due inquiry as to the existence of necessity, he is under no obligation to see to the application of any surplus and hence, a decree confirming the sale conditionally upon repayment by the purchaser to the plaintiff of the sum not applied for necessity, is bad in law. (k) A recent decision of the Board seems to entertain a contrary view. (l)

Sub-Sec- IV -Transferee's duty

Duties of creditors and purchasers.—A lender or a purchaser dealing with a Hindu widow is like one dealing

(f) 18 A. 474; *see* 1926 M. 157; 9 P. 721.

(g) 36 I.A. 138; 5 P. 585 P.C.

(h) 52 I.C. 316 (P.)

(i) 1929 P. 216; 1928 A. 651; 36 I.A. 138.

(j) 14 C.W.N. 895 *see* 27 C. W.N. 365 P.C.; 6 N.L.J.

115.

(k) *See ante p. 116;* 54 I.A.

79 and 211.

(l) 62 I.A. 70.

with a manager bound to enquire into the necessities for the loan or the sale. (m) The *onus* lies on him who wants to take benefits under a transaction, to prove justifying necessity. (n)

Interest.—Even if necessity has been proved, the creditor is bound to show that there was such a necessity as to borrow at a high rate of interest, (o) otherwise it will be reduced ; (p) but the *onus* is shifted, if money could not have been raised at a lower rate of interest. (q)

Presumption of necessity.—The Privy Council has adopted the principle of law that in cases of very old transactions by widows, "presumptions are permissible to fill in the details which have been obliterated by time." (r) But lapse of time does not affect the question of *onus*, (s) though strict proof of legal necessity may not be required in such cases. (t)

As regards the evidentiary value of *recitals in old deeds of transfer* the Privy Council has ruled that recitals cannot be lightly set aside when independent evidence cannot be procured on account of lapse of time. (u)

Sub-Sec. v—Pardanashin lady

A *Pardanashin lady* has been defined as a woman of rank who lives in seclusion shut in the *Zenana* having no communication except from behind the *Purda* or screen with any male persons save a few privileged relations or dependants. (v) But this description of *Purdanishin* lady is too narrow in comparison with what actually exists in India. *Purda* is not only observed by ladies of rank only, but is

(m) *Ante p.* 115.

(n) 46 I.A. 72; 54 I.A. 79.

(o) 19 C.W.N. 80; 6 O.L.J.

469.

(p) 18 I.A. 1:

(q) 51 I.A. 278.

(r) 47 I.A. 6.

(s) 43 I.A. 249.

(t) 37 I.C. 768. (M).

(u) 43 I.A. 420.

(v) 11 M.I.A. 551, 586; 10 L.

761, 766.

generally observed, with the exception of some labouring classes, by Hindu women of Bengal, Bihar and Orissa, and the North Western Provinces.

A person dealing with a Purdanashin lady—must take care to see that the transaction is honest and *bona fide*, that the deed, and the power (should there be any), were *read over and fully explained to*, (w) and *understood by, her* (x) before execution, and that she had *disinterested and independent advice*, (y) and was *free from undue influence*. (z) The Judicial Committee has given much stress on the dictum relating to transactions by *Purdanashin* ladies as laid down previously by the same Board in the following words: while it is important to maintain the principles of law laid down for the protection of *Purdanashin* ladies, it is also important not to transmute such a legal protection into a legal disability. (a)

Sub-Sec. vi—Alienation without necessity

Alienation without necessity whether void after her death.—His Lordship Lord Sinha (Raipur, Bengal, India) has explained the law thus: “It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid by express ratification or by acts which treat it as valid or binding.” (b)

Alienation in excess of necessity.—See *ante pp. 116 and 218.*

Sub-Sec. vii—Court's sanction for alienation

Alienation with sanction of Court.—An alienation cannot be challenged on the ground of want of legal necessity

(w) 38 C.W.N. 1157 P.C.; *see*
13 Pat. L.T. 561 P.C.

(x) 12 P. 359, 389.
(y) 63 I.A. 326.

(z) 28 I.A. 71.

(a) 41 I.A. 23, 31; 32 C.W.N.
929; 63 I.A. 326.

(b) 54 I.A. 396.

if it was made by a widow who obtained Letters of Administration to the estate of the deceased male owner and if it was effected with the previous sanction of the Court ; (c) such an alienation cannot be questioned on any ground which cannot be assailed against any other Administrator. (d)

Sec. 5—ACCUMULATION AND ACQUISITION

Widow's standard of living.—According to Dayabhaga a widow is bound to live a life of austerity but she is not bound to save. But if she saves and makes no attempt to dispose of the savings or accumulations in her life-time, they will follow the corpus of the estate and go to her husband's heirs after her death, and not to her own heirs.

Presumption on accumulations.—When a widow, not spending the income of her husband's estate, acquires immoveable property with her savings and makes no distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. (e) It would be possible for the widow to so deal with the after-purchases that it would remain her own, yet it must be treated and shown to have been so dealt with. (f)

So if the widow acquires immoveable property with the savings of the surplus income, she may deal with it as a full owner, yet it must be traced and shown to have been so dealt with. (g) The true test is the intention. (h) The property thus acquired and made a gift of to her brother by the widow, (i) even by a Will (j), or a *Benami* purchase show her intention to keep the acquisition her own. (k)

Mithila.—The Bengal doctrine is not applicable to cases

(c) 23 C.W.N. 1045.

(h) I.L.R. (1937) 2 C. 97; 32

(d) 90 I.C. 229 (C).

I.C. 831; 35 A. 551; 43

(e) 10 I.A. 150; 14 I.A. 63.

M. 629.

(f) 26 C.W.N. 322, 325 P.C.

(i) 46 B. 37. (j) 65 I.A. 93.

(g) *Supra*, 209.

(k) 55 C. 209.

under the Mithila School where the widow is entitled to the moveables absolutely, and not to the entire income of the immovable property.

Sec. 6 -WASTE

If the widow commits any waste in respect of her husband's estate she may be restrained by the presumptive reversionary heir by a suit. But it is necessary to show that there is danger to the property from the mode in which the widow is dealing with it or apprehension of waste, or real jeopardy to the assets, exists. (*l*) In that case the reversioner may sue for an injunction to restrain her, (*m*) or for the appointment of a Receiver, (*n*) under exceptional circumstances. (*o*)

When cash, or moveable property easily convertible into cash, appertaining to the husband's estate comes to the widow's hands, it is open to the reversioner to file a suit praying that moveables be placed in the hands of a Receiver. (*p*)

Sec. 7 -JUDICIAL PROCEEDINGS*

When widow represents whole estate in suit.—It has already been said that the widow represents the whole estate of her husband which is entirely vested in her, no one else having any present interest in the estate before the termination of her interest.

In order that a decree against the widow may be binding on the reversioner, it is necessary that it should be passed after a fair trial after full contest in a *bona fide* litigation, (*q*) but not one based on a compromise. (*r*) The

(*l*) 6 M.I.A. 433; 31 C. 214; (*o*) 1933 A. 138.
35 I.C. 229 (P); 54 B. (*p*) 43 I.A. 207.
837, 847.

(*m*) 1934 C. 136; 11 Luc. 508. | (*q*) 52 I.A. 322.
(*n*) 1928 N. 93. | (*r*) 9 M.I.A. 539.

question involved in the litigation must be regarding title and not mere possession. (s)

Compromise by widow when binds reversioner.—In order that a compromise made by a widow may be binding on the reversioner, it must be a settlement fairly and *bona fide* arrived at of disputed claims, (t) as prudent compromise, (u) or made *bona fide* for the estate, (v) with due care and caution, (w) by the widow representing the estate, and not one designed to secure a personal benefit for herself which will be no better than any other contract or alienation made by the widow. (x) The widow is not bound at her peril to pursue a litigation to the ultimate Court of appeal. (y)

Presumption.—There is, however, no presumption that a property found to be in possession of a Hindu widow who inherited considerable property left by her husband belonged to him. (z)

Acknowledgment of debt by widow when binds reversioner.—By amendment of the Limitation Act, an acknowledgment signed or payment made by any widow or limited owner shall be valid against the reversioner.

Adverse possession against a widow.—An adverse possession against a widow is not adverse against the reversioner and the latter is entitled to twelve years from the death of the widow to enforce his rights against the trespasser in respect to immoveable property, and to six years in respect to moveable property. (a)

Res judicata.—But in a suit by or against a widow for possession of the estate or part thereof, she and the reversioner are equally bound by the principles of *res judicata*

(s) 65 I.A. 365.

(x) 43 B. *249.

(t) 38 I.A. 87; 47 I.A. 233.

(y) 20 C.W.N. 210.

(u) 54 B. 456 P.C.

(z) 26 I.A. 226.

(v) 49 I.A. 342.

(a) 56 I.A. 267.

(w) 53 I.C. 555, 556 (M).

and the reversioner does not get the benefit of Art. 141 of the Limitation Act. (b)

Adverse possession by widow.—If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *Stridhana* but she makes them good to her husband's estate. (c) A widow when not entitled to possession as a widow at the time when she obtains possession of certain property, her possession becomes adverse even against the reversioners of her husband and may acquire absolute title. (d) Where a widow is in possession of properties belonging to a joint family in lieu of her maintenance, her possession is not adverse to the other members of the family. (e)

What passes in sale in execution against widow.—It will have to be decided by the application of substantially the same principles as have been laid down in the case of a Mitakshara father. (f) Thus, where a widow's estate was sold in execution of a decree against her personally for arrears of maintenance payable by her which was a charge on the estate, only the widow's interest passed to the purchaser. (g)

When the husband's property is sold in execution of a decree for money lent on the widow's personal security only, though for legal necessity, the purchaser would be entitled to the widow's life interest only. (h) The Madras High Court (i) has differed from the above Calcutta decision holding that it is not in accordance with the law enunciated by the Privy Council in *Babuasin's case* and *Daulatram's case*. (j)

(b) 52 I.A. 322; 65 I.A. 365.

(c) 51 I.A. 171.

(d) 49 A. 713; 7 P. 163; See 1929 O. 215; but see 1928 M. 820, 822.

(e) 29 C.W.N. 1037 P.C.

(f) See ante p. 130; 47 A. 563.

(g) 2 I.A. 275.

(h) 12 C.W.N. 769; 30 A. 394.

(i) 34 M. 188.

(j) 13 I.A. 1; 14 I.A. 187.

Sec. 8—PARTITION WITH HUSBAND'S CO-PARCEACHERS

When can widow claim partition. —Two or more widows or daughters who have only a limited interest in the property jointly inherited by them, cannot have the right to claim partition in the sense of division of title, neither can they have an unqualified right to claim partition in the sense of division of possession. It is therefore discretionery with the Court to allow when it appears necessary for securing equal enjoyment to each of them. Still, if granted, it should be carried out in such a manner that it may not be detrimental to the future interests of the reversioners. (k) As regards the widow's right of partition against her husband's co-parceners, the same rule applies. (l) The Lahore High Court has held that the widow has a statutory right to claim partition against her husband's co-sharers. (m)

But since the passing of the Hindu Women's Rights to Property Act (14th April, 1937) the widow, the widow of a predeceased son and that of a predeceased son of a predeceased son, can demand partition as of right.

Movables and cash how divided. —Where in a partition there is a reasonable apprehension of waste of *movables* and cash, provision should be made in the final decree for prevention of waste ; a separate suit for injunction is not necessary. (n)

Sec. 9—REVERSIONERS**Sub-Sec. 1—Right of reversioners**

Reversioner. —The term reversioner as used in Hindu law bears a sense different from its ordinary meaning, for a *Hindu reversioner has no present interest* in the property,

(k) 9 C. 580, 585 F.B.

(l) 9 C. 580, 586 F.B; 1937 A. 321.

(m) 7 L. 356.

(n) 31 C. 214.

the *actual reversioner* may be a person different from the *presumptive reversioner* and his heirs ; the terms 'the next heir of the last full owner' or 'the then next taker or heir', may be used instead of the above expression. A female heir may be a reversioner or the next heir having a qualified estate.

In case of succession of collaterals after the death of the holder of the *widow's estate*, the property inherited by the reversioners, is the separate property of all of them ; and they get *per capita*. (o) The male reversioner is entitled to the reversion as the heir of the *last full owner* and not on account of his relationship with the holder of the *widow's estate* or on account of being the heir or representative of his father.

The reversion—of the so called presumptive reversionary heir is a mere *spes successionis* or chance of succession to the last full owner's estate in case he becomes the actual reversionary heir to the last full owner on the death of the holder of *widow's estate*. (p) Hence it is not transferable and a conveyance executed by the reversionary heir in the lifetime of the holder of *widow's estate* must be inoperative. (q)

By an agreement of surrender from the nearest reversioner, the widow cannot enlarge her life-estate into an absolute estate. (r)

Sub-Sec. II—Surrender

Surrender.—A female heir may surrender or properly speaking withdraw her life-estate and destroy her rights so as to accelerate succession and vest the whole estate in the then next heir, in the same way as if she were dead at that time. (s) It is the effacement of the widow's interest and

(o) See *ante pp.* 165, 183.

(p) 42 I.A. 125; I.L.R. (1937) M. 948.

(q) T. P. Act., Sec. 6, (a).

(r) 45 B. 1167.

(s) 53 I.A. 11.

not *ex facie* transfer by which effacement is brought about. (t)

In order to accelerate the inheritance of the reversioner, the *widow* realising the true effect of surrender, must *surrender the whole* of her limited estate *absolutely and completely in favour of the then reversioner or reversioners and not in favour of one of them, nor to one of the same degree.* (u)

It cannot be denied that a widow can extinguish her rights in her husband's estate so as to accelerate the rights of the reversioner whether he consents to it or not. (v) The gift by the widow of the entire husband's estate to the daughter's son during the life-time of the daughter does not operate as an acceleration of the estate of the daughter's son. (w) But the gift of entire estate to the daughter, (x) or to the reversioner by the mother along with all the daughters, (y) will accelerate the daughter's or the reversioner's estate as the case may be.

Deed of surrender.—There is no particular form to be observed to surrender her interest. (z) It need not be in writing, (a) but if a deed be executed it is required to be registered. (b)

Surrender if affect prior alienation.—The *Calcutta* High Court has held that the reversioner is competent to challenge the validity of alienation during the life time of the surrendering holder of the *widow's estate*. (c) The *Madras*, *Allahabad* and *Patna* High Courts hold that the alienation cannot be questioned during the life time of the surrendering woman. (d) The *Bombay* High Court holds that a widow,

(t) 61 I.A. 200.

(u) 1929 M. 611; 1927 N. 330;
1937 L. 54; 1927 A. 587;
57 I.A. 305; I.L.R. (1938)
B. 723.

(v) 39 B. 87.

(w) 57 I.A. 305.

(x) 61 I.A. 200.

(y) 42 M. 254.

(z) 1925 M. 382.

(a) 1936 C. 106.

(b) 1927 N. 44; 17 P. 95.

(c) 40 C.W.N. 208.

(d) 53 M. 750; 1936 A. 422;
1935 P. 175.

after making some alienation not binding on the estate, cannot make a valid surrender. (e)

Surrender conditionally.—An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, and not a device to divide the estate with the reversioner. (f) A reasonable stipulation for maintenance (g) and residence, (h) or to pay the widow's debts, (i) does not affect the validity of a surrender provided it is a *bona fide* surrender of the entire interest of the widow and not a device to divide the estate with the next reversioner.

Sub-Sec. III—Sale or gift to reversioner

Sale or gift by widow of a portion to reversioner.—A widow in possession of limited estate cannot make a valid transfer of an absolute right with respect to a portion of the estate to the reversioner. (j)

Sub-Sec. IV—Alienation, reversioner's consent

Who's consent necessary.—When there are more reversioners than one of the same degree, the consent of *all* is necessary ; the consent of only *one* or *some* being of no legal effect, the alienation in such a case is absolutely void.(k) The consent need not be given at the time of the alienation. (l)

The consent of female reversioners will not be effectual.(m)

(e) 51 B. 1019; 1938 B. 37.

(f) 46 I.A. 72; 46 I.A. 259.

(g) 1930 L. 9.

(h) 63 C.L.J. 263, P.C. in

+3 C.W.N. 337.

(i) 41 M.L.J. 208.

(j) 46 I.A. 72.

(k) 35 I.A. 1; 17 C. 896.

(l) 35 I.A. 1; 38 B. 224.

(m) 35 C. 1086; 1930 C. 508

Reversioner's consent creates presumption of necessity.

—The holder of *widow's estate* and the reversioner do not represent the whole estate. When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. (n) The consent of the presumptive reversioner to an alienation by the holder of the *widow's estate* merely raises a presumption of valid necessity. (o)

But the presumption does not arise if the transfer was in favour of such reversioner or of one reversioner without objection from all the reversioners. (p)

Lease, gift, devise. —The principle that alienation with the reversioner's consent raises a presumption of necessity, has no application in a case of gift *inter vivos*, (q) or a perpetual lease (r) or a devise by a Will (s) by the holder of the *widow's estate*.

Widow and reversioner cannot enlarge widow's estate—and turn the *widow's estate* into an absolute one. (t)

Consent how given. —The reversioner ordinarily gives his consent by joining the holder of the *widow's estate* in executing the deed of transfer or by attesting the deed reciting his consent to the transfer when he is aware of its contents : (u) but not so by mere attestation when there was no recital of necessity in the deed. (v) But mere attestation is not necessarily equivalent to consent, (w) nor is a rever-

(n) 46 I.A. 72.

(o) 40 C. 721 F.B.

(p) 62 C. 204.

(q) 34 A. 129; 34 B. 165.

(r) 1935 A. 73.

(s) 18 C.L.J. 162.

(t) 10 P. 352; I.L.R. (1938) 2 C. 492.

(u) 25 I.A. 183.

(v) 1933 M. 637.

(w) 20 C.W.N. 210; 1929 A. 223; 10 P. 352.

sioner by signing the deed, estopped from disputing the validity of an alienation made by the holder of the *widow's estate*. (x)

Estoppel by conduct of reversioner.—A reversioner has got no *a prasenti* interest in the estate ; his interest is a mere *spes successionis*. (y) A reversioner, be he a male or female (z) who assents to the alienation by the holder of the *widow's estate*, is estopped from questioning the validity of the alienation, (a) even if the assenting reversioner succeeds to the estate after another intervening female reversioner. (b) The position is not altered even if the assent was obtained for valuable consideration. (c)

Actual reversioner if bound by presumptive reversioner's act.—Actual reversioner, other than the one who was a party to the alienation, may question the alienation. (d) So the actual reversioner even if he be the son of the consenting reversioner is not bound by his father's consent. (e)

Sub-Sec. v—Suits by reversioners

Reversioner's remedy.—In case of an unauthorised alienation of a woman holding *widow's estate*, the reversioner has got two courses open to him, i.e., to sue for a declaration that the alienation is not binding against the estate or to sue for recovery of possession after the death of the woman.

Declaratory suit by reversioner, female and male.—When a widow alienates without legal necessity or alienates more property than what is necessary for raising the amount required, the presumptive reversioner may bring a suit for a declaratory decree, though his interest is merely

(x) 36 I.A. 103.

(y) See ante p. 228.

(z) 51 B. 475 F.B.

(a) 55 A. 157; 46 B. 292; 1935 C. 495.

(b) 52 M. 556 F.B.

(c) 8 P. 352; 1928 B. 495;

1928 M. 1101; see 1930

A. 498.

(d) See 54 I.A. 396.

(e) 68 C.L.J. 173.

a contingent one. (*f*) But where the immediate reversioner has fraudulently colluded with the parties to the alienation, (*g*) or is unwilling to take the trouble, or owing to poverty unable to sue, (*h*) or is precluded by his own act or conduct, (*i*) or is a woman (*j*) who herself has but a qualified interest and could not even by joining in the act of alienation give an absolute title, the remote reversioner may bring such a suit. (*k*) But the nearest reversioner may be directed by the Court to be made a party to the suit. (*l*)

Ordinarily the right to sue belongs to the presumptive reversioner, (*m*) but there is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other woman whose acts are impugned. (*n*)

The limitation. —is twelve years under Art. 125 of the Second Schedule to the Limitation Act (1908) from the date of alienation for both the nearer and remote reversioners. (*o*)

A stranger. —cannot bring such a suit. (*p*)

Such suits if representative. —In a suit by a reversioner for a declaration that the adoption made by widow is invalid, the Privy Council has held that "such a suit by the presumptive reversioner is in a representative capacity on behalf of all the reversioners." (*q*) The Calcutta High Court has applied the above principle in a case of mortgage. (*r*) A reversionary heir appealing to the Court truly for the con-

(<i>f</i>) 13 M.I.A. 209; 51 I.A. 145.	1935 L. 984.
(<i>g</i>) 8 P. 396; 1928 L. 267; 1937 M. 555.	(<i>l</i>) 49 A. 815; 15 P. 379.
(<i>h</i>) 1930 L. 211.	(<i>m</i>) 37 A. 45 P.C; 52 I.A. 398.
(<i>i</i>) 1938 N. 97; <i>see</i> 42 I.A. 125.	(<i>n</i>) 42 I.A. 125.
(<i>j</i>) 1925 L. 156.	(<i>o</i>) 37 A. 195; 41 M. 659 (F.B.)
(<i>k</i>) 32 C. 62; 4 Pat. L.J. 734; 33 M. 410; 50 A. 678;	(<i>p</i>) 1938 C. 468.
	(<i>q</i>) 42 I.A. 125.
	(<i>r</i>) 25 C.L.J. 391.

servation and just administration of the property in the hands of a female limited owner, does so in a representative capacity. (s)

Suit for possession after widow's death. —After the widow's death, the then heir of the husband or the actual reversioner is entitled to recover possession by ejecting the purchaser of any property alienated by the widow without legal necessity whether the property be movable or immovable. (t)

A transferee of the reversioner —can bring such a suit: (u)

Improvement made by alienee. —When the alienation is set aside, the Privy Council (v) has allowed expenses for improvement which have increased the value of the property being set off against the claim for mesne profits.

One such suit against various alienees, —can be brought by the reversioner. (w)

Limitation. —The time within which a reversioner is to sue for possession after the widow's death, is twelve years under Article 141 of Schedule I of the Limitation Act.

Sub-Sec. vi—Deceased widow's debts etc,

Deceased widow's debts. —The actual reversioner succeeding to the possession of the estate after the death of the widow is bound to pay off the debts contracted by the widow for a valid purpose, although the debts were not charged upon the estate. (x) But the Allahabad (y) and Patna (z) High Courts dissent from this view. A Full Bench of the Calcutta High Court has laid down that if a female

(s) 43 I.A. 207; 51 I.A. 381.

36 I.A. 103.

(t) 32 B. 59.

(x) 6 C. 36; 60 B. 311 F.B;
1938 N. 77.

(u) 16 I.C. 634 (C); 10 L. 613;

1926 N. 179.

(v) 26 C.W.N. 257 P.C.

(y) 19 A. 300.

(w) C. P. Code, Or. 1, R. 3;

(z) 15 P. 798.

heir who represents the entire estate, enters into a contract with a tradesman which has conferred a benefit upon the estate and is such as a prudent owner would make for the preservation of the estate, the obligation arising out of it will be annexed to the estate in the hands of the reversioner, if she dies before discharging the same. (a)

Debts properly incurred by a Hindu widow for purposes of the business or a trade to which she as heiress of her husband succeeded, are recoverable after her death from the assets of the business as against reversioners, even in the absence of a specific charge. (b) It is a general principle of Hindu law that he who takes an estate becomes liable for the debts of the estate. (c)

Widow's Sraddha. —The expenses of the *Sraddha* or the exequial right of the widow should come out of the estate. (d)

CHAPTER XIII SUCCESSION TO STRIDHANAM

Sec. 1.—MAIDEN'S PROPERTY, BOTH SCHOOLS ,

A maiden's property—goes in the following order according to both the Mitakshara and the Dayabhaga: (1) *Full brother*, (2) *mother*, and (3) *father*.

In default of them, the nearest relations of the parents take according to the Mitakshara school: the Viramitrodaya cites Baudhayana's text, and then adds—"On the failure of the mother and the father, it goes to *their nearest relations*." The term "*their nearest relation*," has been held to be the father's *Sapindas*, in the first instance, (o) inasmuch as, they are also the mother's *Sapindas*, so the term

(a) 10 C. 823.

(d) 19 C.W.N. 1183.

(b) 26 B. 206 B. F.B; 38 C.
W.N. 33; 33 M. 492; 60
B. 311 F.B; 1929 N. 191.

(o) 18 P. 590; 36 B. 339 F.B;
39 C. 319; see Sundaram
v. Ramsamia, 43 M. 32.

(c) 36 I.A. 138.

H. L. 30

is not to be taken distributively ; and in default of such *Sapindas*, the relations of the mother alone become heirs. (*p*) It is held that the relations are to take a maiden's property in the same order in which they would become heirs to her father, or mother. (*q*)

In the Bengal school the paternal relations must take a maiden's property in the same order in which they inherit a married woman's non-*yautuka* property, in default of the issue of her body and of her brother and parents.

Sec. 2—MITAKSHARA

A married woman's property according to the Mitakshara —passes in the following order:—

- (1) *Maiden daughter.*
- (2) *Married but unprovided or indigent daughter* : (r) there must be marked difference in wealth in order to give preference to the poorer daughter. (*s*)
- (3) *Married provided daughter.*
- (4) *Daughter's daughter* [no preference of maiden over married daughters (*t*)] preferred to daughter's son. (*u*)
- (5) *Daughter's son* (is preferential heir as compared to son.) (*v*)
- (6) *Sons.*—inherit as tenants-in-common. (*w*)
- (7) *Son's son.*
- (8) *Husband (x) and his heirs* in the same order in which they take his property, [*Stridhana* property of woman devolves on her death on her husband, and failing the husband on his *Sapinda* and on failure of the husband's

(*p*) 32 B. 409.

(*q*) 36 B. 339 F.B.

(*r*) 5 I.A. 40

(*s*) 23 B. 229.

(*t*) 48 A. 648.

(*u*) 51 A. 478; 50 A. 375.

390 P.C.

(*v*) 1928 L. 9.

(*w*) 36 B. 124.

(*x*) 1929 O. 296.

Sapindas, it devolves on the blood relation of the deceased], (y) if the marriage took place in an approved form. (z)

But if the marriage took place in any of the disapproved forms, then instead of the husband and his heirs, the mother, the father, the father's heirs, and in their default the mother's relations take.

Preference of female issue.—According to the Mita-kshara the female issue are preferred to the male issue who, however, succeed to the father's estate to the exclusion of the female issue: thus the offspring of the same sex with the parent are preferred for the purposes of inheritance. But the Dayabhaga recognises the preference of daughters only, and that too is limited to *Yautuka* or nuptial only, as is set forth below. It is to be noted how completely a Hindu woman becomes identified with her husband's family; her own relations are excluded by those of her husband just as she is excluded by her father's relations living jointly with him.

The Viramitrodaya and the Vivada-Ratnakara appear to lay down that the following six *relations* are to take before the relations included under the general rules, that is, before the husband's heirs in case of approved forms of marriage of the deceased woman and before the parents' heirs other than the brother in the disapproved forms of marriage respectively. The authority has been recognised in Mithila cases, (a) and also in a case governed by the Benares school. (b)

The order of succession—among the six relations in the cases of approved marriage appears to be as follows:—(1) the husband's younger brother, (2) the husband's brother's son, (3) the husband's sister's son, (4) her own.

(y) 48 A. 663.

1927 P. 392; 1928 B. 380;

(z) Approved form: see *ante*

1929 O. 11.

pp. 37-38; 37 M. 293; 23

(a) 21 C. 344.

A.L.J. 981; 8 L. 366;

(b) 12 C. 375.

brother's son, (5) her own sister's son (6) and the son-in-law. (c)

But the Calcutta High Court has held that as the Mitakshara gives completely and exhaustively the order of succession to *Stridhana* property, so no effect can be given to the Viramitrodaya. (d)

Sec. 3—MITHILA, MAHARASTRA AND DRAVIRA

Mithila, Maharashtra and Dravira Schools.—With respect to succession to *Stridhana* property, the rule laid down in the Mitakshara is not followed in its entirety by *these schools*. Having regard to the conflicting texts of the sages, they limit the daughter's preferential rights to certain descriptions of woman's property, (e) such as the *Yautuka*; and as regards the rest they maintain the joint succession of the son and the maiden daughter. (f)

But the Patna High Court has held that there is no reason to suppose that in *Mithila* the *Stridhana* property devolve after the husband or the parents in a manner different from that laid down in the Mitakshara. (g)

The son succeeds in preference to son's son to the *Stridhana* property which is not *Anvadheyaka*, (h) a technical *Stridhana*, in cases governed by the *Mayukha*. (i) The details are not given here; but it should be mentioned that these schools do not agree in all respects, nor do they lay down the order of succession in a complete and exhaustive manner. As regards the *Maharashtra school*, it should be noticed that, except if those districts where the authority of the *Mayukha* is followed, the Mitakshara rule prevails. (j)

(c) 12 C. 348.

(g) 13 P. 550.

(d) 25 C. 354.

(h) See page 205.

(e) See 65 I.C. 672 (N.).

(i) 41 B. 618.

(f) See 34 B. 385.

(j) See 65 I.C. 671 (N.).

Sec. 4—SULKĀ

The Sulka or bride's price —(k) however, goes to a woman's uterine brother in preference to her own issue ; but if there be the mother, she is to be preferred to the brother.

Sec. 5—DAYABHAGA SUCCESSION

Dayabhaga rules —on the subject are not so simple as those of the Mitakshara. The author divides *Stridhana* property into two classes, namely, *Yautuka* and *Ayautuka* or non-*yautuka*, the latter includes property received previously or subsequently in connection with the marriage, but the former is not entirely confined to presents given actually before the nuptial presents ; the limits within which such presents become *Yautaka Stridhana* are somewhat narrow. (l)

Succession to Yautuka —is in the following order :—

(1) *Maiden daughter*, (2) *betrothed daughter*, (3) *married daughter*, —1st, one having or likely to have a son, 2nd, one that is not so, (4) *son* (including adopted son), (5) *daughter's son*, (6) *son's son*, (7) *son's grandson*, [(8) *rival wife's son*, (9) *grandson* and (10) *great-grandson* are placed here by Srikrishna] (11) *husband*, (12) *brother*, (13) *mother*, and (14) *father*, [(15) *rival wife's son*, *daughter*, *son's son* and *daughter's son* according to the author.]

Succession to Ayautuka. —(other than father's gifts) :—

(1) *Son and maiden daughter*, (m) (2) *married daughter* (n) having or likely to have sons, (3) *son's son*, (4) *daughter's son*, but not step-daughter's son, (o) (5) *barren and childless widowed daughters*, [(6) *son's grandson*, (7) *rival wife's son*, (8) *grandson* and (9) *great*

(k) See page 205.

(l) See ante p. 205.

(m) 22 C.W.N. 990.

(n) Ibid.

(o) 60 C. 1061.

grandson are placed before barren and childless daughters by Srikrishna,] (10) *son's grandson*, (11) *whole-brother*, (12) *mother*, (13) *father*, (14) *husband*, [(15) *rival wife's son, daughter, son's son and daughter's son*, are placed here by the author.]

The half-brother's true position in the order, is not free from doubt and difficulty. It has been held that his position is not before the husband's younger brother. (p)

Succession to all classes of *Stridhana* after the above relations, is in the following order:—

(1) *Husband's younger brother*, (q) (2) *husband's brother's son*, (3) *sister's son* (r) preferred to half-brother, (s) [sister's son's son is not an heir (t)] and (4) *husband's sister's son*, (5) *brother's son*, comes before step-daughter's son, (u) (6) *son-in-law*, (7) *husband's sapindas &c.*, (8) *father's kinsmen*.

Sec. 6---FALLEN WOMEN'S HEIRS

Woman of the town.—Should a woman become degraded by becoming a woman of the town, her connection with her undegraded relations does not cease, so that the latter can be her heirs. (v)

A Hindu woman does not cease to be a Hindu by reason of her degradation on becoming a woman of the town ; and succession to her property is governed by Hindu law. (w) Degraded woman's property should pass to the undegraded kindred in preference to her degraded relation after her death, (x) and, at any rate, to the exclusion of the Crown.(y)

The illegitimate children of persons other than *Sudras*, are not their heirs, (z) but the illegitimate daughter even

(p) 37 C. 863.

(u) 60 C. 1061.

(q) 23 C.W.N. 1038.

(v) See *supra* p. 191-192.

(r) Includes half-sister's son;

(w) See *supra* p. 191-192.

40 C. 82.

(x) See *supra* p. 191-192.

(s) 89 I.C. 827 (C.)

(y) 51 B. 784.

(t) 38 C.W.N. 98.

(z) 38 M. 1144.

among twice-born classes, inherits the property of her mother in preference to trespassers. (a)

Dancing girls—are not governed by ordinary Hindu law in matters of succession but by custom.(b) The ordinary law of inheritance which excludes woman or prefers males to females and allows only a limited interest to female heirs, has no application to the dancing girl caste. (c) So a female issue of a fallen woman may inherit the property of the male issue of the same woman. (d) If such a woman gives up the calling of her community and adopts the life of a respectable married woman, her acquired property would devolve according to the ordinary rules of Hindu law. (e)

CHAPTER XIV HOLY ORDERS AND ENDOWMENT

Sec. 1 ·PERSONS OF HOLY ORDERS

Different stages of life.—The life of a Hindu *Brahmana* and the other twice-born classes, was divided into four stages. He had to pass the *first* stage of his life as a *Brahmachari* or student, living with the *Guru* or preceptor of the sacred literature as a member of his family ; the *second*, as *Grihastha* or house-holder ; the *third* as a *Vana-prastah* or one retired from the world, residing in some solitary place with persons of the same order, engaged in religious practices and contemplations of the deity ; and the *fourth*, as a *Yati* or itinerant contemplative ascetic, supported by what is voluntarily given by people, or by begging in the evening.

A Math —means a place for the residence of ascetics and their pupils and the like.

(a) 56 I.C. (N).

(d) 58 B. 119.

(b) 1935 M. 58.

(e) I.L.R. (1938) M. 257.

(c) 33 M.L.J. 207.

Vaishnavas.—There are persons belonging to a certain religious sects of modern origin such as *Vaishnavas* who are Hindus (*a*) and who resemble, in some respects, the life-long students and itinerant ascetics. They are connected with the well-known *Maths* or *Mahantis*.

The *Byragis* belong to this sect ; and among them there may be married and celibate classes. (*b*)

Sannyasis. —The founder of these *Maths* were learned *Sannyasis* or monks of the *Vaishnava*, *Saiva* or *Sakta* sect, who observing celibacy and leading a pious life of austerity, wandered from one place to another carrying with them an image of the Deity representing a certain attribute of Him, and teaching the truths of religion to those that, attracted by the sanctity of their life, flocked to them. They were prevailed upon by the piety of some *Rajas* or influential men that became their disciples, to settle in particular localities, receiving grants of land from them for the maintenance of themselves and their pupils called *Chelas* that accompanied them, lived with them and observed celibacy. It has been held that a *Sudra* cannot become a *Sannyasi* or ascetic. (*c*)

Proof that a person is Sannyasi.—In order to prove that a person has adopted the life of a *Sannyasi* it must be shown that he has actually relinquished and abandoned all worldly possessions and relinquished all desire for them, (*d*) or that such ceremonies are performed which indicate the severance of his natural family and the secular life. (*e*) It must also be proved in the case of orthodox *Sannyasi* that necessary ceremony has been performed, (*f*) without which the renunciation will not be complete. After a person becomes initiated as a *Sannyasi* he becomes dead for the pur-

(*a*) 35 C.W.N. 726.

(*d*) 33 M.L.J. 63; 18 C.W.N.

(*b*) 1935 L. 545.

59; 1934 B. 385;

(*c*) 40 C. 545; 1922 B. 295;
22 M. 302; see 40 M. 846.

(*e*) 14 C.W.N. 191; 50 A. 485.

(*f*) 1933 P. 70; 57 A. 85; 33

M.L.J. 63.

poses of succession and inheritance and the person who is entitled to succeed him takes his property.

Sec. 2—ENDOWMENT

Dharma. —While dealing with *Dharma* or man's religious duty, Manu declares that in the present *Kali* age *charity* alone is the supreme *Dharma* or religious duty to be performed by man for his spiritual welfare. When a Hindu gives property for the purpose of *Dharma* he intends to secure *Dharma* in the sense of religious merit by appropriating or applying the property for the benefit of man in two forms, namely, *Ishla* or *Purta* i.e., *religious* or *charitable*.

The forms or modes of charity are substantially the same here as in England. They are: consecration of image of the Deity in temples for worship: establishment of hospitals: establishment of *Maths* which are either Monasteries for the *Sannyasis* or monks or persons adopting holy orders and their disciples receiving religious instruction, or residential colleges for students, or asylums for the poor and the religious mendicants, or shelters for travellers or guest-houses, or temples where education is imparted to resident students, or a combination of some or all of them ; establishment of *Sattras* or alms houses ; establishment of *Atithisalas* or places of shelter for pilgrims, wayfarers and ascetics who do not stay more than one day ; establishment of schools for dissemination of knowledge (the last three are often connected with temple of God) ; excavation and consecration of wells, tanks and other reservoirs of water for drinking, bathing or irrigation purpose ; Planting and consecrating shady trees for the benefit of wayfarer ; and the like.

The word *Dharma*, therefore, conveys the idea of *charity*.

The Privy Council has held that a bequest to any (*Chatram*) charity which has been indicated, is not void for vagueness and uncertainty. (g)

(g) 51 I.A. 282.

H. L. 31

Private and public endowments.—Endowments are either *public* or *private*. In the former the public are interested and in the latter certain definite persons only are interested. When property is dedicated to charitable, educational or religious uses, for the benefit of an indeterminate body of persons or where the public are freely allowed to worship and no permission of the head is necessary for such purpose, (h) nor any fee be enforceable for entrance into the temple, (i) the endowment is a public one. But when property is set apart for the worship of a deity of a particular family in which no outsider is interested, the endowment is a private one.

Can private endowments be converted secular?—In the case of a family deity the consensus of the whole family might give the estate another direction. (j) But the Calcutta High Court has held that the question cannot be said to be settled ; (k) nor is there any warrant for the proposition that at any particular time by the consent of all parties then interested in the endowment an endowment can be set aside ; but the Privy Council on appeal expressed no opinion. (l)

Dedication how effected.—A dedication may be made by a written Instrument either by a gift *inter vivos* or by a Will, and it is not incumbent that it must be done by a *Sankalpa* or *Samarpan*. (m) A gift to the trustees on behalf of a deity, must be in writing and registered ; where on the occasion of marriage or death, a dedication is to a deity by *Mantras* or recitations from the *Sloka* it need not be in writing or registered. (n) A document constituting a trust of property for a public religious purpose does not require registration nor does a gift to God require a registered document for its creation, even if it relates to landed property. (o)

(h) 30 I.C. 822.

W.N. 960 P.C.

(i) 44 B. 150.

(m) 16 L. 85.

(j) 4 I.A. 52.

(n) 42 M. 440; 54 I.A. 136.

(k) 54 C. 30.

(o) 50 M. 687 F.B.; 54 I.A.

(l) 60 C. 54 on appeal 41 C.

136.

Endowment irrevocable. —When the donor of an endowment has completely divested himself of the property dedicated, he cannot revoke the trust or derive any benefit therefrom, except what has been reserved. (o)

Sec. 3 - IMAGES

Images, symbol for deity. —The images worshipped by the Hindus are visible symbols representing some form of the attribute of God contemplated as having one only of His threefold attributes, upon which is based the Hindu idea of Trinity, namely, God the Creator, God the Preserver and God the Destroyer, the same perhaps, as God the Father, God the Son and God the Holy Ghost. The lump of metal, stone, wood or clay forming the image is not the God, but the invisible *personified* deity manifesting itself to the devotees by means of the image, is the God to a Hindu.

Removal of images. —When an image has once been consecrated with appropriate ceremony, it must be worshipped, and it cannot be replaced by another image, unless it has become unfit for worship by reason of any of the grounds stated in texts. But the removal of the image from an old dilapidated temple to a newly built temple is not within the powers of the trustee when a large number of worshippers are against the removal. (p) The Privy Council (q) has held that the will of the deity is to be taken into consideration in regard to its location ; but it is not to be understood that a general proposition has been laid down. (r)

Destruction and pollution of images. —If the image is cracked, broken, mutilated, or lost it may be substituted by a new one duly consecrated. (s) The destruction of an image does not destroy the endowment. (t)

(o) 41 C.L.J. 22; 51 A. 621.

(r) 45 C.L.J. 41.

(p) 44 B. 466.

(s) 41 C. 57.

(q) 52 I.A. 245.

(t) 8 C.L.J. 369. (Spl. Bench)

Sub-Sec. i—Juridical person

Possession of property.—When a Hindu dedicates property for the worship of the deity by means of an image, which is directed to be consecrated, the property is by a legal fiction deemed to be vested in a Juridical, Juristic or Judicial (*u*) person.

Whether deity perpetual minor.—The deity represented by the image is not a perpetual minor so as to prevent the operation of the law of limitation (*v*) or to bar a suit for specific performance of a contract. (*w*)

Whether consecration before gift necessary.—Where a testator directed to spend the surplus income of his estate, in the worship of the Goddess *Kali* after having consecrated an image, the gift was valid, the principle of the *Tagore* case being inapplicable to such gifts. (*x*)

When gift void.—But a dedication not to any particular deity (*y*) or to one to be subsequently installed, without mentioning the particular deity to whom the property was dedicated, (*z*) or one containing vague direction, (*a*) is void for uncertainty.

Sec. 4—MUTTS & SATTRAS**Sub-Sec. i—Mutts**

Mathas, Mutts or Mattams.—There are many *Mutts* or monasteries in all parts of India and specially in the Deccan that were founded by the disciples and followers of the great religious teacher *Sankara-acharya*, (*b*) the *Mohunts* of which are called after the names of the ten disciples of the four most favourite pupils of his and hence, the *Mutts* are called *Dasnamis*.

(*u*) 52 I.A. 245.

(*x*) 37 C. 128 F.B.

(*v*) 60 C. 54,73.

(*y*) 46 C. 951.

(*w*) 60 C. 111, 128; *see* I.L.R.

(*z*) 33 A. 793.

(1937) 1 C. 84.

(*a*) 40 C. 232; 1933 L. 833.

(*b*) *See* 50 A. 485.

Mutts are of three descriptions,—namely, *Maurasi*, *Panchayati* and *Hakimi*. In the *Maurasi Mutts* the office of the chief *Mohunt*, devolves upon the disciple of the existing *mohunt*, who, moreover, usually nominates him as his successor. In the *Panchayati Mutts* the office is elective, the presiding *Mohunt* being selected by an assembly of *Mohunts*. In the *Hakimi Mutts* the appointment of presiding *Mohunt* is vested in the ruling power or in the party who has endowed the temple. (c)

Sub Sec. II.—*Sattras*

Sattras.—*Sattras* are religious and charitable establishments like *Mutts*, the instinctive idea conveyed by the term being the distribution of food and drink.

Sec. 5—MOHUNTS

Mohunts.—The *Mohunts* or the heads of these institutions are called *Dasnami Sannyasis*, (c1) namely: (1) *Giri*, (2) *Sagar*, (3) *Parvat*, (4) *Puri*, (5) *Saraswati*, (6) *Bharati*, (7) *Tirtha*, (8) *Asram*, (9) *Ban* and (10) *Aranya*. The several institutions are called by one or the other names of the ten disciples of the four most favourite pupils of *Sankaracharya* and the heads of the institutions are named accordingly.

Woman as Mohunt.—A woman can be the *Mohunt* of the *Dharmasala Sain Bhagat* in *Lahore*. (d)

Mohunts and Mutt property.—The property belonging to the *Mutts* is regarded as *Debutter* belonging to the deity established by the founder. The trustee or manager is called *Mohuni*, *Sebayel*, *Sevak*, *Adhikari*, *Paricharak*, *Dharmakarta* or the like.

(c) 21 C.L.J. 9.

(c1) See ante p. 240 *Sannyasi*.

(d) 11 L. 673.

His position with respect to Mutt property.—The Privy Council, (e) on the position of a Mahanta or the head of a *Mutt* with respect to its property has held that: “ In no case was the property conveyed to or vested in him nor is he a ‘trustee’ in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration.” A *Dharmakarta* therefore, is literally and no more than the manager of a charity, and his rights, apart from the question of personal support, are never higher than that of a trustee. (f)

The position of the Mohunt—is analogous to that of a widow, but there is danger in pressing the analogy too far. (g)

The addition to Section 10 of the Indian Limitation Act enacts: “ For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowments shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee therof.” (h)

His rights same as holder of widow's estate.—The position of the head of the *Mutt* is analogous to that of a widow holding her husband's estate, but there is danger in pressing the analogy too far. (h1)

His resignation.—A *Mohunt* can resign the office and can nominate his successor, giving the fraternity notice of such vacancy (h2)

His removal.—See *post* Sec. 9, Sub-Sec. ii “ Removal of Manager.”

(e) 18 I.A. 302.

(f) 49 I.A. 237.

(g) 28 M.L.J. 410; see 20 C.W.N. 314.

(h) Act 1 of 1929.

(h1) 28 M.L.J. 410; 20 C.W.

N. 314.

(h2) 68 C.L.J. 44 P.C: (1938)

2 M.L.J. 332.

Sec. 6—ENDOWED PROPERTY**Sub-Sec. I—Nature of property**

Different kinds of endowed property.—There are usually three descriptions of such property:—

(1) Property of temple as *Devasthanam* which is vested in the ideal juristic person, *viz.*, the God to which it is dedicated, of which the *Sebayet* is a mere manager.

(2) Property of *Mutts* which is vested in the preceptor or head of the institution, as corporation sole, who has at his disposal the income derived from the endowments of the *Mutt* as well as from money-offerings of its disciples and followers. (i)

(3) Property held by a *Mutt* or other charitable institution as a juridical person and managed by its head as a trustee.

(4) There may be another description of property. It is not illegal if the founder of a public temple create a trust to the effect that the temple shall be maintained out of the offerings to the deity and the balance should go to himself and his family, provided it did not offend the rule against perpetuities. (j)

Holder's position.—“The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled

(i) *But see* 34 I.A. 78.

(j) 53 M. 608.

to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. * * * The general trustee is only a representative of the deity who is a juridical personage, and who is the true owner, and there is nothing illegally incongruous in that personage having other subordinate representatives who have the right to manage certain special portions of the property, and pay over the income so collected to the endowment, and even to some degree to control its use." (k)

Mohunt's right to income.—The money-offerings, if made to the *Mohunt* personally, may belong to him absolutely, (l) but if he is *expected* by the donor, to spend the surplus income of the endowment for charitable and educational purposes, then he must be held to be under legal obligation to fulfil the *expectation*. The surplus income should be invested for the benefit of the *Mutt* or temple, and the Court may be moved for settling a scheme for its protection and expenditure. (m)

Temples, —are oftener than not, combined with *Mutts* or asylums of ascetics for religious instruction and with other charitable institutions.

Personal property of Mohunt. —The offering made to a *Mohunt* is not the property of the trust, but belongs to him. (n) It cannot be presumed to be a trust property although it might have devolved in the spiritual line for several generation, but to be assumed to belong to the holder as owner. (o)

Dedication how effected.—See *ante* page 242.

(k) 43 M. 665, 672 P.C.

(l) See foot note (n) below.

(m) 34 I.A. 78.

(n) 35 C.L.J. 188.

(o) 1938 P.C. 195.

Sub-Sec. ii—God and Mutt owner

God and Mutt owner.—Amongst the Hindus *Dharma* i.e., religious duty or act, is identical with charity ; and charitable institutions established by orthodox Hindus are invariably connected with images of Gods consecrated either by themselves or by their ancestors. The property is vested in the God deemed to be a juridical or juristic person, (*p*) and as such capable of holding property ; and this appears to be the true legal view when the dedication is of the completest kind. (*q*)

Sub-Sec. iii—Family deity

Dedication to family gods.—Every respectable Hindu family has its family god. In most cases there is no property dedicated to it ; the worship is voluntarily conducted by the descendants of the founder. If any member refuses to bear the expenses of his *Pala* or turn of worship, in such a case it has been held that he cannot be compelled to do so, the *obligation being a moral one.* (*r*)

In some cases the worship of the image is made a charge upon certain property that is not entirely dedicated. (*s*) Such property is heritable and transferable, *subject to the charge.* (*t*)

When any property is entirely dedicated for the worship of a Deity and no person has any beneficial interest in the property, it becomes absolute or complete *Debutter*.

Determination of nature of Debutter.—It should be observed that in order to constitute any property *Debutter*, it is necessary to prove that the property was dedicated, and that rents and profits of same have all along been appropriated to the worship. (*u*) The treatment of the property by the donor and his successors is the test whether the

(*p*) 48 I.A. 302.

(*s*) See 49 I.A. 100.

(*q*) 2 I.A. 145; 31 I.A. 203.

(*t*) 6 I.A. 182.

(*r*) 5 W.R. 29

(*u*) 8 W.R. 42; see 16 L. 85.

H. L. 32

endowment is real and *bona fide*, or nominal and colourable made for defrauding creditors. (v) The question whether an absolute *Debutter* is created or there is merely a charge in favour of the *Deb-seva* depends upon the terms of the deed and the circumstances of each case. (w)

Sec. 7 - MANAGEMENT

Management of family Debutter. —The powers of a manager of the property dedicated absolutely for the worship of a family God are the same as those of the manager of the property of a *Mutt*. The law on the subject is explained as follows,—“ According to Indian common law relating to Hindu religious institutions * * * the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments, but they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenue thereof may alone be pledged for the necessities of the institution. (x) In the absence of justifying causes, a *Mohunt* or a *Sebayet* cannot create a tenure to endure beyond his life. (y) ”

Accretions.—In almost all public or private religious institutions various persons after their foundation made additional endowments at various times. These contributions by other persons are accretions to the original foundations. (z)

Possession of property.—It is only in an ideal sense that property can be said to belong to a deity; the possession and management of it, must, in the nature of things, be entrusted to some person as *Sebayet* or manager. (a) This carries with it the right to bring whatever suits are necessary for the protection of the property, every such right of suit is vested in

(v) 42 C. 536; 10 P. 388.

(w) 43 I.A. 143, 145; 1937 P. C. 185.

(x) 27 M. 465, 472; F.B.

(y) 47 M. 337 P.C.; 48 I.A.

302.

(z) 45 C.L.J. 41, 53 appeal from 53 C. 261; 50 C. 292.

(a) 2 I.A. 145, 152; see *ante*

p. 224.

the *Sebayet*, and not in the deity. (b) The person so entrusted must do whatever may be required for the service of the deity, and for the benefit and preservation of its property, at least, to as great a degree as the manager of an infant heir. (c)

Accounting.—The manager or the *Sebayet* or the Mohunt is answerable for mal-administration as a trustee in the general sense, (d) otherwise he is not accountable for management nor for expenditure of the income. (e)

Delegation of rights.—He can appoint sub-agents for carrying out his duties but cannot delegate his rights. (f)

Application of funds.—He has ample discretion in the application of the funds of the *Mutt*, but always subject to certain obligations and duties governed by customs and usages; (g) but cannot alter the fundamental objects of the body, unless such a power is specially reserved. (h)

Extinction of Sebayet's right.—A *sebayet* has no vested interest in the *Debutler* property, he is merely a manager of the deity and ceases to be a *Sebayet* when he ceases to manage the property and carry on the worship, (i) or he resigns the office, or is removed.

Removal of manager.—See Sec. 9, Sub-Sec. ii below.

Sec. 8—DEBTS AND ALIENATION

Sub-Sec. I—Debts

Debts.—Notwithstanding that property dedicated to religious purposes is, as a rule, inalienable, it is competent for the *Sebayet*, in the capacity of manager to incur debts for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the deity, defending

(b) 31 I.A. 203, 210.

(g) 48 I.A. 302; 54 I.A. 228.

(c) 2 I.A. 145, 152.

(h) 53 M. 737.

(d) 50 M. 567.

(i) *Bhuban v. Narendra*, 35

(e) 2 M. 175.

C.W.N. 478.

(f) 60 C. 111.

hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. (j)

Debts how to be repaid.—It should be paid by the *Sebayet* personally or else realised from the profits of the *Debutter* property to be collected by a Receiver. (k) But the Patna High Court has held that the Court may direct the sale of such property for discharging a debt. (l)

Sub-Sec. ii—Alienation of property

Alienation.—A *Sebayet* cannot alienate the endowed property without real necessity for the trust. (m) but can create derivative tenures if beneficial to the estate. (n) But in the absence of legal necessity, he cannot grant a permanent *Mokarari* lease, (o) though the rent fixed was adequate at the time; the lease cannot enure beyond the grantor's life. (p) But such a lease, after the manner of widow's alienation, is good for the life-time of the grantor (q) and his successor may ratify it so as to validate it for his life.

Mohunt same as manager of infant's estate.—His powers are similar in some respects to those of a manager of an infant's estate. (r) The principles of *Hanooman Persaud Panday's* case apply to transfer made by him. Except in a case of such unavoidable necessity the *Sebayets*, the managers or the trustees of a temple, or the *Mohunt* of a *Mutt* have no power to sell or mortgage the endowed property; they have no right to impair the endowed property by creating or granting, in favour of any one, rights of a permanent occupancy in the endowed property. (s)

(j) 2 I.A. 145, 151.

(k) 6 P. 139 P.C.; 54 I.A. 228. • |

(l) 8 P. 48.

(m) I.L.R. (1937) 1 C. 84.

(n) 13 M.I.A. 270.

(o) 40 M. 745; 63 C. 326.

(p) 36 I.A. 148; 44 I.A. 147.

(q) 48 I.A. 302; 60 I.A. 124.

(r) 2 I.A. 145; see ante p. 246

"His rights same as holder of widow's estate"

44 I.A. 126.

51 I.A. 83. See Ch. V,

Sec. 5, Sub-sec. iii, pp.

114-115.

Legal necessity *—means the preservation of the estate, keeping up the worship, defending litigation or his own position as *Sebayet*, repairs of the temple and other property, restoration of the image and so forth. (*t*)

Alienation in excess of necessity.—See page 116.

Purchaser's remedy when alienation set aside.—See page 117.

Gift.—No one has any power to make a gift of any portion of the property belonging to a trust. (*u*) But a gift of an image and its property of a private endowment, with concurrence of the whole family, to another family for carrying on the worship, is valid. (*v*)

Sub-Sec. III—Alienation of *Sebayet*'s rights

An assignment—of the right of management is beyond the legal competence of a trustee under the common law of India, and cannot be validated by any proof of custom. (*w*) The sale of the right of management and of the endowed property was held null and void, in the absence of a custom allowing them. (*x*) There are decided cases (*y*) from which it appears that the turn of worship can be mortgaged.

The *Calcutta* High Court holds that the office cannot be transferred *inter vivos* even to a *co-Sebayet* or to one next in succession. (*z*) But the transfer *inter-vivos* of a turn of worship or *Pala* to a *Sebayet* or to one who is next in order of succession, may be justified in the special circumstances of the case, as also on proof of custom. (*a*)

The *Patna* High Court entertains the same view. (*b*)

* See *ante* pp. 114-115.

(*t*) 21 M.L.J. 129; 37 I.A. 27; 4 I.A. 52; 44 I.A. 147; 54 I.A. 228.

(*u*) 1929 L. 868.

(*v*) 36 C. 975; see 59 C.L.J. 514.

(*w*) 4 I.A. 76.

(*x*) 27, I.A. 69.

(*y*) 39 C. 227; see 41 I.A. 267.

(*z*) 53 C. 132; but see 1935

M. 220.

(*a*) 36 C. 975; 42 C. 455.

(*b*) 6 P. 245.

The *Bombay* and *Madras* High Courts (*c*) hold that such transfers are valid.

Sub-Sec. iv—Alienation of office.

The Office of a Mohunt, —in the absence of a custom to the contrary, cannot be transferred to another. (*d*)

Alienation of office of a priest.—The office is not saleable. (*e*) The office of priest (*Purohit*) is not an immovable property ; hence, the right to office cannot be mortgaged or leased. (*f*) When the right to receive offerings made at a temple is independant of an obligation to render services involving qualification of a personal nature, such a right is transferable. (*g*)

Sec. 9—JUDICIAL PROCEEDINGS

Sub-Sec. i—Suits relating to endowments

Who can sue.—The right to sue for the trust property is vested in the *Mohunt* or *Sebayet*. The *disciples of a Mutt* have sufficient interest to maintain a representative suit not only for a declaration that an alienation made by the head of a *Mutt* is invalid, but also for a decree directing that the possession be restored to the head in possession of the *Mutt*. (*h*) A *de facto Mohunt* may maintain a suit for the benefit of *Mutt*. (*i*)

Similarly a *co-Sebayet* or one who is entitled to become the *Sebayet* after the present incumbent may sue to set aside an alienation. (*j*) The *founder* or his *heirs* may invoke the assistance of the Court for proper administration of the *Debutler* property. (*k*)

(*c*) 6 B. 298; 15 M. 183.

(*h*) 41 M. 124.

(*d*) 63 C. 426.

(*i*) 57 A. 159 P.C.

(*e*) Sripathi v. Krishna 41 C. L.J. 22.

(*j*) 35 C.W.N. 768; 1937 C. L.J. 559.

(*f*) 36 M. 850; 46 C. 455; 26 M.L.J. 482; 1 C.W.N. 493.

(*k*) 24 C.W.N. 471; 53 C.L.J. 621.

(*g*) 50 A. 394

Act XIV of 1920. —When a trust has been created under this Act, the author is to be ascertained and the trust must be indicated by words or acts with reasonable certainty, as also the purpose, the trust property and the beneficiaries. (kr) Any person having an interest in any express or constructive trust for a public purpose of a charitable or religious nature, may apply for an order directing the trustee to furnish certain informations relating to the trust estate or an order directing the examination and auditing of account. (l)

Sec. 92 of C. P. Code. —Any two or more persons having an interest in a public trust may institute a suit under Section 92 of the Civil Procedure Code for removing the trustee and for other reliefs. (m)

The Courts have jurisdiction —over trusts so as to settle schemes. (n) Where a family has a right to worship with some emoluments attached to it, the Court may direct worship by turns for a certain number of days and to receive the offerings by each member during his turn of worship. (o) The Court has no power to grant leave to a *Sebayet* to transfer *Debutter* property. (p)

Suit for share of rent or royalty, —by one *Sebayet* is not maintainable. (pr)

Sub-Sec. ii—Removal of managers

Removal and appointment of manager etc. —If a *Sebayet* or trustee of a *public* endowment becomes guilty of a breach of trust, two or more persons directly interested in such trust, may institute a suit for the removal of the trustee under Section 92 of the Civil Procedure Code. The

*(kr) 65 I.A. 252; 57A 330 P.C.	: (n) 34 I.A. 78.
(l) The Charitable and Religious Trusts.	: (o) 1930 A. 383.
(m) 50 M. 567.	: (p) I.L.R. (1937) 2 C. 133.
	: (pr) 61 I.A. 35.

Civil Courts have jurisdiction over trusts so as to remove the trustees from their position as managers. (q)

Act. XX of 1863—provides that any interested person may bring a suit against a trustee guilty of misfeasance or neglect of duty or of breach of public trust, for the removal of the trustee.

Private endowment.—This Act does not apply to private endowments. (r) The Privy Council has stated that: (s) “The grounds for removing a *Sebayet* from his office may not be identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest which together make up the office of *Sebayet* may well prevent the closeness of the analogy, but as part of the office it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal”.

Sub-Sec. III.—Suits for account

Any person interested in any trust for a public purpose of a charitable and religious nature, may under the Charitable and Religious Trusts Act (t) apply for the auditing of accounts.

Sub-Sec. iv—Probate and Letters of Administration

Who can apply.—A *Mohunt* or a *Sebayet* is not the owner of the property of the *Mutt* and, therefore, cannot apply for Probate or Letters of Administration in respect of *Mutt* property. (u)

(q) 43 I.A. 73.

(r) 19 C. 275; 14 M. 1.

(s) 48 I.A. 243.

(t) Sec. 6 of Act XIV of 1920.

(u) 20 C.L.J. 307; 17 C.L.J.

66.

Sub-Sec. v—Suits relating to certain rights

The exclusive right claimed by a priest (*Purohit*) to officiate at ceremonies of a family, is not enforceable at law, (v) but the right to hold the office of imparting *Upadesam* and of receiving emoluments is; (w) so also a suit to enforce one's right to *Jajman-britti* (x) or *Brit Mahabrahmani* (y) is enforceable in a Court of law.

The Madras High Court holds that no such suit is maintainable unless no fees or emoluments are attached to the office. (z)

But the Bombay High Court holds that where the office is attached to a shrine, a suit is maintainable, (a) but no suit is maintainable where the office is merely personal. (b)

Sub-Sec. vi—Parties to suits

Who can bring suits.—*Sec ante p. 254.*

Parties.—The right to sue for the protection of the trust property is vested in the *Sebayet*. (c) So in a suit regarding the right to worship and possession of the deity installed by the ancestor of the contesting parties, the deity or, the female members are not necessary parties.(d) But in a suit for the removal of the deity from one place to another, the deity and the worshippers, male or female, are necessary parties. (e) The deity is a necessary party when deity's interest is in dispute. (f)

Sub-Sec. vii—Res judicata

Res judicata. —A decree properly obtained against a

(v) 14 C.W.N. 1057; 26 M.L.

J. 482.

(w) 33 C.W.N. 382 P.C.

(x) 45 A. 445; 15 C.L.J. 376;

36 B. 94.

(y) 1929 O. 257.

(z) 28 M. 23.

II. L. 33

(a) 16 B. 281.

(b) 2 B. 470.

(c) See pp. 254-255.

(d) 33 C.W.N. 96.

(e) 52 I.A. 245.

(f) 38 C.W.N. 151 P.C.

Sebayet or the head of a *Mutt*, is binding on his successor, and may operate as *res judicata*. (g)

Sub-Sec. viii—**Adverse possession**

Adverse possession. —The possession of a co-trustee must be considered to be the possession of all the trustees and no adverse possession can be set up against any of the trustees. (h) One may acquire title by adverse possession against the *Sebayet* and hence, against the deity. (i)

Sub-Sec. ix -**Limitation**

Limitation. —When an alienation of the office or of the endowed property has been illegally made, it may be set aside by a *co-Sebayet* or by one entitled to become the *Sebayet* after the present incumbent. (j) Article 124 of the Limitation Act applies in such suits ; there is no distinction between the office and property. (k)

Section 10 of the Limitation Act did not apply to religious endowment. (l) The new amendment of Section 10 of the Limitation Act (m) has made the provisions of this Section applicable to such managers. After this amendment no suit against the manager or his legal representative or assigns, for the purpose of following such property, or proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time when the transfer was not for valuable consideration.

By the addition of Article 134B (m) in the Act, the limitation for suits to recover possession of immovable property comprised in the endowment which has been transferred by previous manager for a valuable consideration, is twelve years from the death, resignation or removal of the

(g) 29 M. 553; 9 C.L.J. 597.

(h) 1927 M. 948.

(i) 42 C.W.N. 469.

(j) 35 C.W.N. 768, 771.

(k) 27 I.A. 69.

(l) 48 I.A. 302.

(m) Act I of 1929.

transferor. Hence all transfers other than gratuitous transfers are covered by this Article.

The words "the death, resignation, or removal of the *transferor*" of Article 134B indicate when the time begins to run ; and show that time will not begin afresh.on the death, resignation or removal of each holder of the office.

Section 10 and Articles 48B, 124, 134A, 134B and 134C of the Limitation Act should be read in this connection.

Sec. 10—SUCCESSION

Sub-Sec. i—Succession to Muttis

Succession of persons of various orders.—The rule of succession to office of *Mohunt* or a head of a *Mutt* is founded and moulded on the text of Yajnavalkya which provides that a virtuous pupil, a religious brother residing together, and the preceptor, are respectively successors to the property left by an ascetic, (*Yati*) a hermit (*Vanaprastha*) and a life-long student (*Brahmachari*). These latter were all *Sannyasis*, the distinction being due to the different circumstances under which they had become so. If the distinction be thrown out of consideration then the succession of a *Chela*, *Gurubhai* and *Guru* resembles the succession of a pupil, a religious brother and the preceptor, to the property of the said persons. (n)

If a *Sannyasi* attached to a *Mutt*, other than the *Mohunt*, dies leaving property it would go to his *Chela*, *Guru* or *Gurubhai* on the analogy of the said text, as well as on the analogy of succession of son, father and brother.

Chela. —The succession to the office is moulded on the same analogy, the *Chela* is primarily entitled, (o) but his succession is regulated by the *usage* of the *Mutt*. (p) In some, the office goes to the senior *Chela* according to the usage which is to be proved. (q)

(n) See 1926 N. 351.

(o) 39 B. 168; 44 M. 704.

| (p) 43 I.A. 73.

(q) 11 M.I.A. 405.

But the *Chela* being the heir to his *Guru's* personal property, (r) neither nomination nor election can affect his right of succession. It may, by usage, devolve on the succeeding *Mohunt* as the latter's personal property ; but it cannot devolve on the natural heirs of the deceased *Mohunt*. (s)

Nomination.—The *nomination* or *ordination* of a junior *Pandarasannadhi* (or the head of a *Mutt*) in some cases, is the customary mode of providing for the line of succession in the *Mutt* by its head.

Election.—In others, the successor is *elected* by the neighbouring *Mohunts* by the opinion of the majority assembled for the purpose (t) or by the heads of the *Mutts* (u) of that class of *Sannyasis* or selected by the ruling power from amongst the *Chelas* of the deceased *Mohunt*, but the burden of proof lies on the person who sets up his right to nominate the successor of a *Mohunt* alleging the *Mutt* in question as a subordinate *Gadi* to his. (v)

Nomination by heirs of founder.—It is competent to an heir of the founder of a shrine, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees. (w)

Succession to hereditary trusteeship in a public endowment,—devolves according to the laws of inheritance applicable to private property. (x)

Sub-Sec. II.—Succession to private endowments

Founder and his heir's powers.—The donor or founder and his descendants have the right to appoint the manager or *Sebayet* (y) and to direct the mode of succession to the

(r) 65 I.A. 254.

(s) 65 I.A. 254; 50 A. 485.

(t) 42 I.A. 115.

(u) 39 B. 168, 173.

(v) 1930 P.C. 245.

(w) 40 M. 612; 36 A. 161; 1936

N. 223.

(x) 1936 M. 294.

(y) 29 A. 663; 4 A.L.J. 565.

office of the *Sebayet*. A person may appoint himself as the first *Sebayet* and reserve to himself the power of appointing his successor which, however, is not exhausted after being exercised once, but it entitled him to make repeated nominations. (z)

The donor of a *Debutter* property, without an express reservation of power, cannot alter the order of succession contrary to the terms of the deed. (a) After the death of the endower the rules of succession are unalterable by his successor. (b)

A mode of succession of *Sebayets* contrary to the ordinary law of succession, cannot be directed in the endowment, and, hence, such direction, so far as the persons not in existence at the death of the creator of the endowment are concerned, fails, and the *Sebayets* revert to the heirs of the founders. (c)

A woman is not disqualified—from succeeding to a hereditary religious office on account of her sex, (d) for she can have the duties of such office performed by proxy.

Sub-Sec. ii—Acceleration of succession

Just as a person can give up the life of a house-holder and adopt the life of a *Sannyasi* and thereby accelerate the succession, so also a *Sannyasi* by again adopting the life of a house-holder accelerate the succession to the property and office he held as a *Sannyasi*, of person who stands next in the order of succession.

A *Sebayet* can transfer his rights to a *co-Sebayet* or to one who is next in the turn of succession, (e) so that the succession may be deemed to be accelerated. But the transfer must be in favour of all the *Sebayets* (f) and of the entire interest.

(z) 1930 A. 620.

(a) 50 C. 197; 38 C.W.N. 15.

(b) 41 C.L.J. 22, 27.

(c) 29 C.W.N. 17; 60 C. 452.

(d) 42 C. 455, 475; 44 M. 205.

(e) 35 C.W.N. 768, 772; 6 B.

298.

(f) 15 M. 183; 35 C.W.N. 768.

Sec. 11.-PARTITION

Of property or office of head of a Mutt.—The office of the head of a *Mutt* or its property cannot be subject of partition. (g) The essence of the law governing the *Mutts* lies in the following of custom or usage ; *prima facie* such separation would be improper, unless there are special circumstances justifying it. (h)

Partition of office of Sebayet of family deity.—The office of a *Sebayet* is not divisible where there are more *Sebayets* or trustees than one, inasmuch as, they hold as joint-tenants. (i) But if they have a pecuniary interest such as a right to the votive offerings, then they may come to a *quasi-partition*, that is, to an arrangement whereby each of the *Sebayet* may, by turns, become the sole manager for a definite term. (j) But by custom (k) or by terms of family arrangement (l) worship by turns, as well as delegation of a turn by one to another *co-Sebayet*, is valid.

CHAPTER XV IMPARTIBLE ESTATE

Sec. 1.—HISTORY OF IMPARTIBLE ESTATES

Origin.—The impertible estates originated in three different ways, namely :—

(1) Most of them appear to have originally independent chiefs who have gradually been in course of time reduced by the paramount power to the position of ordinary *Zemindars*.

(2) In some of them, a share of the rents and profits of the landed property formed the emoluments of public hereditary offices which could be held by only a single mem-

(g) 45 I.A. 1.

(j) 13 B. 548; 22 W.R. 437.

(h) 56 I.A. 204.

(k) 42 C. 455.

(i) 19 A. 128.

(l) 33 I.A. 139.

ber of the family and so was descendible to a single heir by primogeniture.

(3) While the rest appear to have owed their origin to family arrangements followed up in practice for many generations.

A custom of descent according to the law of primogeniture may exist by *Kulachar*, although the estate may not be what is technically known either as a *Raj* in Northern India or a *Polliam* in the Deccan. (z)

It cannot be created.—An imitable estate descending according to a rule of lineal primogeniture with rights of maintenance for the junior members cannot be established in modern times, (a) by a private individual. (b) Imitable *Zemindari* is the creature of custom. (c)

Sec. 2—EVIDENCE OF IMPARTIBILITY

Onus as to imparability.—The *onus* lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which the estate is to be held by a single member, and, as such, is not liable to partition, (d) or it must be proved by him that it is from its nature imitable and descendible to a single person. (e) It is a creature of custom and the custom should be proved to be ancient and invariable (f) by clear and unambiguous evidence. (g)

There is no presumption that all extensive *Zemindaries* are imitable. (h)

Imitable *Zemindaries* had generally some services attached to them which by lapse of time became merely fictitious, the release of these fictitious services by the Crown did not render the estate partible. (i)

(z) 2 I.A. 263; see 32 C. 6.

(a) 29 C.W.N. 846, 851 P.C.

(b) 45 I.A. 134.

(c) 24 C.W.N. 857 P.C.

(d) 55 I.A. 45.

(e) 41 I.A. 51.

(f) 48 M. 254 P.C.

(g) 14 M.I.A. 570.

(h) 1930 N. 35.

(i) 15 N.L.R. 176 P.C.

Evidence of family usage by which the eldest son successively for eight generations succeeded to a *Zemindary* to the exclusion of other sons, was held to be sufficient to establish it to be imitable. (*j*) But the mere fact that an estate has not been partitioned for six or seven generations, will not make it imitable where previous partition is proved. (*k*)

Giving up chance to succession.—In order to establish that an imitable estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention, expressed or implied, on behalf of the junior members of the family to give up their chance of succession to the imitable estate. (*l*)

Extinction of imitable estate.—The discontinuance and abandonment of the custom by the concurrent will of the family or from accidental causes may put an end to imitability (*m*)

Sec. 3—HOLDER'S RIGHTS

Holder's rights and jointness.—The sons of present holder of an imitable estate do not acquire right by birth and cannot demand partition nor question the alienation of the estate by the holder ; but the birth-right of the senior member to take by survivorship exists. (*n*) The senior member's right to take by survivorship is not a mere *spes successionis* (*o*) but is capable of being renounced and surrendered. (*p*)

Alienation.—It is concluded that the Mitakshara law of alienation is not inconsistent with imitability (*q*) and the holder of the estate is competent to alienate it, unless

(*j*) 5 M.I.A. 169.

(*n*) 59 I.A. 331.

(*k*) 1 I.A. 1; see 50 C.L.J. 267.

(*o*) I.L.R. (1937) M. 906.

(*l*) 38 C.W.N. 1101 P.C.

(*p*) 59 I.A. 331.

(*m*) 50 C.L.J. 267.

(*q*) 59 I.A. 331; 32 T.A. 261.

there be a custom against alienation proved to exist. (r) It will be the self-acquired or separate property of the alienee. (s)

Madras legislation on alienation.—The Madras imitable Estates Act 11 of 1904 (Sec. 4) declares that “The proprietor of an imitable estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other co-parceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other co-parceners independently of their consent.”

Privy Council on holder's rights.—“Imitatibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The *first* of these cannot exist in the case of an imitable estate, though ancestral, from the very nature of the estate. The *second* is incompatible with the custom of imitatibility, * * * and so also the *third*. * * * To this extent, the general law of the Mitakshara has been superseded by custom, and the imitable estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of *survivorship* is not inconsistent with the custom of imitatibility. This right, therefore, still remains. * * * To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property.” (t)

(r) 8 I.A. 48; 54 I.A. 289.

(s) 43 C.W.N. 594.

(t) 59 I.A. 331.

Debts of deceased holder.—A son taking the estate by descent takes it with the burden of a decree obtained against the father, and is liable to be proceeded against in execution. (*u*)

Acquisitions.—The holder of the imitable estate, other than that granted by the Crown (*v*) within stated boundaries, can enlarge the estate by adding other properties to it. (*w*) But the intention to do so must be present otherwise it will not assume the character of imitable estate. (*x*) The Bombay High Court holds that property acquired out of the income becomes the separate property of the holder. (*y*)

Movable property.—There can be no incorporation of movable property with an imitable estate. Such property cannot form an accretion to an ancestral imitable estate so as to assume the character of imitatibility. (*z*)

Sec. 4—MAINTENANCE TO JUNIOR MEMBERS

Maintenance of junior members and grants.—The junior members of the family are entitled to maintenance; but apart from *custom* and from *certain near relationship* to the holder, the junior members of the family have no right to maintenance out of it, and that there is no invariable custom by which any member of the family *beyond the first generation from the last holder*, can claim maintenance as of right. (*a*) It rests on such member to prove the custom negativing the ordinary law. (*b*)

According to the Bengal school,—however, the right to maintenance out of such property is expressly declared, not as an incident of co-ownership ; hence, the question as

(*u*) 6 C.W.N. 876; 2^o Pat. L.J. 136; 33 M. 108.

(*y*) 56 B. 619.

(*v*) 45 I.A. 134.

(*z*) 59 I.A. 331.

(*w*) 59 I.A. 331.

(*a*) See 54 I.A. 289.

(*x*) 16 P. 1 P.C.

(*b*) 24 C.W.N. 226, 228, P.C.

to the right of remoter descendants in the junior lines, must depend on custom.

Descendants of grantees.—It seems that a grant has been presumed to have been for the grantee's life only. (c) Grants for maintenance, however, are not in all cases to be necessarily presumed to have been gifts of life-interest only. (d)

Mode of grant.—Maintenance may be given in cash ; or grants of land appertaining to the estate, may be made in lieu of maintenance, the rents and profits of which, are enjoyed by the grantee and his heirs in the male line. (e)

Amount.—In determining the amount of maintenance to be awarded to a junior member, regard should be had to the income of the *Raj* and other sources of income, if any, and to the claims of other members of the family, as well as to the expenditure necessary for maintaining the position and dignity of the holder as a *Raja*. (f)

Wrongful withholding—of maintenance and unwillingness to pay the same will entitle the claimant to a decree for the arrears within the period of limitation. (g)

Maintenance grants, ancestral, impartible and alienable.—Grants of land made for the maintenance of the junior members and their male descendants only, are resumable on their default. The Courts presume them to be alienable in the absence of proved family custom, or express terms in the grant, to the contrary. (h) In some cases the grants are held to be impartible, (i) while in others, they are held to be divisible like other ancestral property ; (j) they are held to become ancestral property in the hands of the grantee. (k)

(c) 32 I.A. 185.

(d) 9 C.L.J. 576.

(e) 20 I.A. 9; see 5 C. 113.

(f) 21 A. 232.

(g) 27 I.A. 151, 157.

(h) 36 I.A. 176.

(i) 35 I.C. 392 (Pat); 36 C.

943.

(j) 35 C. 823.

(k) 17 C.L.J. 38.

Sec. 5—SUCCESSION

Primogeniture lineal and ordinary.—In *lineal primogeniture* preference is given to the *senior line*: and the succession goes to the nearest in degree in that line, although he may be remoter in degree to another member of the family, who belongs to a junior line; should there be more members than one in the nearest degree in the senior line, then the succession goes to the eldest among them; in default of any one in the senior line, it goes to a similar member in the *next senior line*; and so on.

But by *ordinary primogeniture* preference is given to nearness in blood irrespective of the line, and the succession goes to the *nearest in degree* although he may belong to the most junior line; should there be more than one in the same degree, the succession goes to the eldest among them, to whichever line he may belong.

Where succession is governed by custom and not by the ordinary law and the eldest son of the last holder succeeds according to it, it would be wrong to think that such succession has anything to do with heirship to the last holder; for, the whole course of succession must be taken to be governed by custom irrespective of heirship to the last or any holder, although relationship to him is undoubtedly the most important factor, but the same should be dissociated from the idea of heirship which does not apply.

The distinction between the Dayabhaga and the Mitakshara, should, however, be always kept in view, according to the former of which it is the nearest in blood to the *last male holder*, that is the proper heir, and not the senior member of the whole group of agnates. (l)

Women.—An imitable estate may be the subject of co-ownership so as to pass by survivorship to male members to the exclusion of the widow, the daughter and the

daughter's son, of the last holder. The widow of the last holder of the estate may succeed to the impartible estate, in the absence of any proof of custom excluding her from succession, if her husband was separated from the members of the family. (m) Where the property is ancestral and the family undivided, a custom modifying the law, must be a custom to admit women, not a custom to exclude them. (n)

Succession to acquisitions.—The acquisitions from the income follow the ordinary rule of succession, unless the facts show that the owner intended to treat it as part of the estate. (o)

Priority among sons by different mothers.—When the last holder leaves sons by different wives of the same caste, the first-born son is entitled to become the successor, although his mother may be junior to his father's other wives that are also mothers of male issues. The rank or position of the mothers does not confer priority. (p)

Sec. 6—ADVERSE POSSESSION

In order to acquire title by adverse possession by a member of a joint family, the co-parcener's title must be denied and he must be absolutely excluded. (q) A possession is never considered adverse if it can be referred to a lawful title. (r)

CHAPTER XVI ALIENATIONS AND WILLS

Sec. 1—ALIENATION*

Sub-Sec. I—Property

History of alienation of land.—The descriptions of property found in the (*Smritis*) Codes of Hindu law, are,

(m) 42 I.A. 192.

(n) 11 I.A. 149.

(o) See *ante p.* 266, "Acquisitions".

(p) 28 I.A. 100.

(q) 24 I.A. 118.

(r) *Corea v. Appulamy*, (1912) A.C. 230.

* Alienation by Karta, see *ante p.* 113; by member, p. 192; by widow, pp. 214-221; by manager of endowment pp. 252-253; by holder of *impartible* estate, p. 264.

immovable, movable and *Nibandha*. Great importance is attached to immovable property. It was deemed to be the hereditary source of maintenance of the members of the family ; its living members could not alienate its property. Texts absolutely prohibiting alienation of land appear to indicate the ancient law. In the course of time, the right of alienation had to be recognised. There were four kinds of property dealt with by the commentators on Hindu law, namely, (1) land, (2) *Nibandha*, (3) slave, and (4) movable.

Sub-Sec. ii—Power of alienation

Capacity to alienate.—The subject of alienation has already been considered while the Mitakshara joint family, (a) the Female heirs, (b) the Endowed properties (c) and the Imparible Estates, (d) have been dealt with.

Owner incompetent to alienate.—Want of discretion incapacitates a person from making any transfer of his property ; accordingly a person who is a minor, or an idiot, or a lunatic, cannot alienate his property.

Alienation of movables.—Gifts of small portions out of affection to members of the family are expressly allowed. A bequest of the bulk of ancestral movables to one of two sons even, to the exclusion of the other, cannot be valid. (e)

Alienation of a single co-parcener's interest.—In the Bengal school each co-parcener is free to alienate his share without the consent of his co-heirs.

Whereas under the Mitakshara, no individual member can alienate any joint property in which he has not individually any right or interest as may be transferred. The Mitakshara law incapacitating a co-parcener from alienating

(a) *Ante pp. 113 etc. and 122 etc.*

(b) *Ante pp. 214-221 etc.*

(c) *Ante p. 252 etc.*

(d) *Ante p. 264.*

(e) *See Ante p. 109.*

his undivided co-parcenary interest has been modified to some extent in Madras and Bombay by the operation of the principles of equity in favour of purchasers for value, founded on the co-parcener's unrestricted right to call for partition. (f)

But no member of a joint family in India can make a valid gift or bequest of his joint interest. (g)

Alienation by non-owner.—A *Sebayet* or trustee managing an endowed property and a guardian managing an infant's estate, may in certain circumstances alienate the property under their charge, although they have no personal interest in the same. (h) So the *Karta* or a managing member of a joint family may make a valid alienation of the interests of himself as well as of other members in a joint property under certain circumstances. (i) Similarly a Hindu widow or other female heir whose right of alienation in the property inherited by her, is ordinarily restricted, may make a valid transfer for raising money for certain purposes. (j)

The leading case on this subject is that of *Hunooman Parsad Pandey* (k) and the principles laid down are as follows,—

1. The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate.

2. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate.

3. The actual pressure on the estate, the danger to be

(f) See pp. 122 etc. and 124
supra.

(g) See p. 125 *supra*; 1926
B. 463.

(h) See *ante* pp. 252 &c.
(i) See *ante* pp. 113 etc.

(j) See *ante* pp. 214-221 etc.
(k) See *ante* pp. 252 etc.

averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

4. The lender is bound to enquire into the necessities for the loan, and satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting, in the particular instance, for the benefit of the estate.

5. If he does so enquire, and acts honestly the real existence of an alleged, sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge: in other words, a *bona fide* creditor or transferee should not suffer when he has acted honestly and with due caution, but is himself deceived. And

6. Under such circumstances, he is not bound to see to the application of the money.

Sub-Sec. iii—Pre-emption

In Behar the right of pre-emption was adopted and is enforceable irrespective of the parties concerned. (*l*) It also applies among the Hindus of the District of Sylhet. (*m*) The pre-emptor must be either a native or domiciled in the place where the custom prevails. (*n*) The right is to some extent made applicable in the Punjab by statute. (*o*)

Where the pre-emption is claimed by a Hindu, he must comply with all the requirements of Mahomedan law. (*p*)

Sec. 2—Gift

Sub-Sec. i—Definition and requisites of gift

Gift is defined by Hindu lawyers to be the creation of another person's proprietary right after the extinction of one's own proprietary right in the subject matter of the gift.

(*l*) 39 I.A. 107, 106.

(*m*) 25 C.W.N. 901, 904; 61 C. 694.

(*n*) 32 C. 988.

(*o*) Act XII of 1878; Punjab

Customs 186.

(*p*) 48 I.A. 475; 25 C.W.N. 901.

According to the definition of Gift in the Transfer of Property Act, Section 122, the requisites of a valid gift are as follow:—(1) the subject of the gift must be a certain existing property, (2) it must be made voluntarily and without consideration and (3) it must be accepted by or on behalf of the donee during the life-time of the donor and while he is still capable of giving ; but if the donee dies before acceptance, the gift is void.

It should be noted here that the provision to the effect that nothing in the second Chapter of the Transfer of Property Act shall be deemed to affect any rule of Hindu law, has now been repealed by Act XX of 1929, and the whole of the second Chapter is now made applicable to the Hindus. Section 123 which prescribes the mode of effecting a gift, does affect the rules of Hindu law on the subject. Having regard to the amendment of Sections 2 and 129 of the Transfer of Property Act, the Hindu law of gift based on texts has, practically, become of no importance being replaced by the Transfer of Property Act.

G. P. Notes. —The recognised mode of transferring Government Promissory Notes and the like is, by endorsement. (q) But the delivery of such notes to the donee in contemplation of death by the donor, but without endorsement ,was held to be sufficient to vest them in the donee (r) and the donor's legal representative is liable to endorse the same to him after the donor's death. (s)

Sub-Sec. II—Conditional gift & Doatio Mortis Causa

A Hindu has power to make a *conditional gift* of property whether by way of remainder, or by way of executory bequest, upon an event which is to happen, if at all, imme-

(q) 12 B. 573.

(r) 3 B.L.R. O.C. 113.

H. L. 35

(s) 6 M.H.C. 270.

dately on the close of a life in being. (*t*) The donee to whom the gift over is made must be alive and capable of taking when the gift speaks, and the gift is to take effect on the death of a person then alive. (*u*)

Under the category of conditional gifts, comes a *gift made in contemplation of death*, the gift being defeated or revoked on the recovery of the donor. The thing must be proved to have been delivered with the intention of making it the property of the donee from the time of delivery subject to a conditional right of resumption. (*v*)

Sub-Sec. III—Gifts to women

Husband's gift. —Gift of property by a husband to his wife is not deemed to create such an absolute right of the wife over it as to entitle her to dispose of it according to her pleasure. (*w*) .

The rule of Hindu law appears to be an exception to the rule embodied in Section 95 of the Indian Succession Act and in Section 8 of the Transfer of Property Act, namely, that *in the absence of express reservation*, the entire interest of the testator or transferor will pass respectively to the legatee or transferee. By recent amendment of Section 2 of the Transfer of Property Act, (XX of 1929) the whole of Chapter II of this Act, in which Section 8 is included, has been made applicable to the Hindus and thus the Hindu law on this subject has been abrogated. Section 95 of the Succession Act (XXXIX of 1925) is also made applicable to the Hindus (*vide* Section 57) with some reservation (*vide* Schedule III para 2) of the restriction.

The Privy Council explained the Hindu law that it is not necessary that express power of alienation should be

(*t*) 9 M.I.A. 123, 135.

^{186, 405; see also 3 B.L.}

(*u*) 16 I.A. 51.

R. O.C. 113.

(*v*) 6 M.H.C. 270; *see* 17 B.

(*w*) D. B. 4, I. 8.

bestowed upon her in order that she may enjoy absolute ownership when it is conferred upon her. (x)

Advancement. —A deposit in a Bank in the name of the wife or in the joint names of both husband and the wife by the husband, raises no presumption, in Indian law, of intended advancement in favour of the wife. (y) In this connection read the next topic “*Benami purchase*. ”

Benami purchase. —In coming to the conclusion on the principle of advancement, the Privy Council relied on the principle laid down by it in *Kerwick v. Kerwick*. (z) In this case it is laid down that *Benami* transaction is recognised in India, and, in such a *Benami* purchase in the name of a wife or child, no presumption arises as in England. (a)

Gift to women other than wife. —Words sufficient to pass an absolute estate if the gift were made to a man, will confer the same estate on a woman. (b) Where the terms of the grant are not known, no presumption of law arises that it was intended to create an absolute or a life-estate, and he who sets up any one of such estate, is to prove it. (c)

Sub-Sec. iv—Existence of donee

Donee must be in existence. —It was held by the Courts that the donee must be in existence at the time when the gift was to take effect. But the legislature has by statute made such gifts valid. The Act of the India Council (d) is subject to the limitation and provisions contained in Sections 14, 15 and 20 of the Transfer of Property Act, and Sections 100 and 101 (now, 113, 114, 115 & 116) of the Indian Succession Act. (e) The Madras Act, however, limited its operation in Section 4 and 5 of the said Act to prevent the violation of the rules against perpetuity.

(x) 57 I.A. 291 and 282; 55 I.A. 197 and 180.

1 Pat. L.J. 16.

(c) 42 C.W.N. 1053; see 1938

B. 125.

(y) 55 I.A. 235.

(d) Act XV of 1916.

(z) 47 I.A. 275.

(e) Sec. 2 read with Sec. 3 of Act. of 1916.

(a) 6 M.I.A. 53.

(b) 24 C. 406; 26 M.L.J. 516;

Sub-Sec. v—Rules of perpetuity and remoteness

Possible, not actual events. —A deed and a Will are to be construed by having regard to possible future events without waiting for actual events. (f)

The Indian Succession Act appears to have adopted the English rule of perpetuity, but with a difference as to the period to which the vesting can be delayed, for the period according to English law consists of the life-time of a person or persons living at the testator's decease *plus* the absolute term of twenty-one years ; but according to Section 114 of this Act the period consists of the lifetime of a person or persons living at the testator's death *plus* the minority of the unborn person who must come into existence before the death of the living person or persons. So under the Indian law, it is an indefinite period varying practically from the lifetime only of living person or persons, to the said life-time *plus* eighteen years and also the period of gestation, according to the date when the unborn person comes into existence in fact or in contemplation of law. The language of Section 114 is as follows:—" No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond" the said period and so it clearly implies that regard should be had to possible events.

Section 14 of the Transfer of Property Act embodies the same rule ; but its language is somewhat different, it is as follows:—" No transfer of property can operate to create an interest which is to take effect after " the said period. It seems to indicate that the actual event determines the validity of a transfer *inter vivos*.

According to case-law neither of these two Sections were applicable to Hindus who had been held to be incompetent to make a gift to an unborn person. But these Sections have been made applicable to the Hindus by the Hindu Disposition of Property Act (XV of 1916) and again subse-

(f) See 55 I.A. 180.

quently by Section 14 of the Transfer of Property Act (XX of 1929), by the amendment of Section 2.

Sub-Sec. vi—Priority among transferees

Notwithstanding the rule of Hindu law permitting transfers by word of mouth only, the same has been altered by the Transfer of Property Act as regards sales, mortgages, leases, exchanges and gifts (g) of immovable property, with few exceptions.

In a case of competition between two successive deeds relating to rights to, or interest in, the same immovable property, one of which is unregistered and the other registered, the registered deed is declared by Section 50 of the Indian Registration Act to take effect against the unregistered one, even if the latter be anterior to the former.

Sub-Sec. vii -Universal donee

The universal donee, appears to be liable not only to pay the donor's debts but also to meet the donor's obligation to furnish maintenance to the donor's wife (h) and the like, to the extent of the property.

Sec. 3—WILLS

Sub-Sec. i—How applied to Hindus

Wills unknown.—Wills were unknown to the Hindus. Wills among Hindus are sought to be explained as “a development of the law of gifts *inter vivos*. ” A Will is described by the Privy Council as “a disposition of property to take effect upon the death of the donor” which “though revocable in his lifetime, is until revocation a continuous act of gift up to the moment of death, and does then operate.”(i)

The Hindu Wills Act (XXI of 1870) extended to Hindu Wills a large number of Sections of the Indian Succession

(g) See Secs. 54, 59, 107, 118 and 123. | (i) Tagore v. Tagore, 18 W. R. 350, 366.

(h) 2 A. 315.

Act. The Hindu Wills Act and the Indian Succession Act of 1865 as well as some other Acts have been repealed by Act XXXIX of 1925 in which most of the provisions of the Acts repealed, have been incorporated with but slight alterations.

Sub-Sec. ii—Testamentary power

Who can make Will.—A minor cannot make a Will, but a Hindu who has attained the age of discretion is competent to give power of adoption to his wife; according to Hindu law, one who has completed the fifteenth year is major ; and Section 57, with Sch. III, lays down that nothing in it shall affect any law of adoption. It seems, therefore, that a Hindu, whatever his age may be, can by a Will empower his widow to adopt.

Excluding heir-at-law.—He can be disinherited only by a valid disposition in favour of other persons, and **not otherwise**.

Sub-Sec. iii—Construction of Wills

New mode of devolution.—It has already been stated that no person can, either by gift *inter vivos* or by testamentary device, lay down a new mode of devolution. (j)

Estates, limitation.—Hindus are held competent to create contingent interests by way of remainder or by way of executory devise, upon an event happening at the latest, on the close of a life in being.

Remainder or executory devise.—When a testator bequeaths to one legatee a property, not absolutely, but to be enjoyed for a limited period, and his remaining interest therein to another, the latter is called remainder or executory devise under different circumstances ; if the remaining interest is not bequeathed, it reverts to the testator's estate, and is called *reversion*.

(j) Tagore *v.* Tagore, 18 W. R. 350, 364; 38 I.A. 112.

Limit. —To *limit* is to mark out or describe the extent of interest bequeathed by stating its commencement, duration, termination, &c.: and *limitation* means either act of limitation, or interest limited.

Legacy, vested & contingent. —A legacy may be either vested or contingent. A *vested* legacy is either vested in interest only, or vested in both interest and possession ; a *contingent* legacy depends on the happening or non-happening of some uncertain future event.

A legacy again may be *absolute* or *conditional*: a condition is either *precedent* or *subsequent*. A *condition precedent* is one which must be fulfilled before the legatee can take a vested interest ; but as the law favours vesting, substantial compliance with such condition is sufficient: A *condition subsequent* is one on the fulfilment of which a legacy given to, and vested in one person, goes over to another person by divesting the former ; but as the law disfavours divesting, strict fulfilment of such condition is required to give effect to the ulterior legacy.

Accumulation. —Where the direction to accumulate is unreasonable, or unlawful, or inconsistent with, or repugnant to the gifts made, it must be rejected as inoperative. (k) It must depend on the circumstances of each case as to how far effect can be given to such direction.

Construction of Wills. —In construing a Will, the object of the Court is to ascertain from its wording the *expressed intention*, (l) and effect must be given to it, and not to *unexpressed intention* : since, to do that would be to speculate and to make a new Will for the testator ; intention is to be gathered from the words of the entire Will, taking them in their ordinary meaning, (m) and putting on them a benignant construction ; (n) and should not overlook the customs,

(k) 8 C. 378.

C.W.N. 8 P.C.

(l) 1938 P.C. 228.

(n) Sec. 74, Succession Act.

(m) 11 L. 657, 663 P.C.; 40

habits and predilection of the class to which the testator belonged. (o)

Summary of the rules.—The substance of the general rules of construction in the Succession Act, is as follows:—The meaning of a clause is to be collected from the entire Will, (S. 82, I.S. Act) without rejecting any part admitting of reasonable construction, (S. 85); the intention must be expressed or necessarily implied by the language of the Will, (S. 74); for determining what property or person is intended, evidence may be taken of facts the knowledge of which is conducive to the right application of the words; (S. 75); evidence is also admissible in case of latent ambiguity (S. 80); if the thing bequeathed is sufficiently identified from its description, a part of the description may be rejected if it does not apply to any property, but not otherwise (S. 78), (S. 79); when the words of the Will show what person is meant then an error either in the name or in the description may be disregarded or corrected, one by the other (S. 76); a word omitted may be supplied by context (s. 77); the meaning of words may be abridged or extended, if the testator appears from the Will to use them in that sense, (S. 83); the same word should be taken in the same sense (S. 86); of two meanings of a clause that which gives it some effect should be preferred to the other according to which it has no effect (S. 84); effect is to be given to the testator's intention even partially where effect to full extent cannot be given (S. 87); and where two clauses are irreconcilable, the last shall prevail (S. 88); according to the maxim: “The first grant and the last Will prevails.”

NOTES ON LEADING CASES

[Arranged in alphabetical order]

Abraham, Charlotte v. Abraham, Francis, 9 M.I.A. 199.

Fact : —Matthew Abraham, a Protestant native of Madras, died intestate. His ancestors for several generations had been Christians. He married a European wife and adopted the language, dress, manners and habits of English persons till his death.

Point for decision : —What was the law which governed the succession to the property of late Matthew Abraham.

Decision : —(i) Madras Regulation III of 1802 applies to Hindus and Mahomedans, not by birth only but by religion. (ii) The succession to the estate of such person as Abraham was to be decided by reference to the usages of the class to which the deceased belonged. (iii) Upon conversion of a Hindu to Christianity, the Hindu law ceases to have any obligatory force upon the convert. (iv) He may, like the religion, renounce the old law or may abide by it. This is determined by course of conduct after his conversion showing what was the law by which he intended his rights to be governed. (v) The *lex loci* Act, No. XXI of 1850 held not to apply where parties have ceased to be Hindus in religion. (vi) By conversion to another religion, the Hindu joint family co-parcenary is severed.

Amarendra Mansingh v. Sanatan Singh, 60 I.A. 242. (Dompara Raj case).

Fact : —Raja Brojendra being without a son, gave an authority to his Rani to adopt. About 4 years after a son was born and known as Bibhudindra and a year after he succeeded to the estate on the death of his father and remained in possession for about 20 years. He died un-

married as a minor. A week later after his death his mother adopted Amarendra who was a minor. According to the custom of the family women are excluded from inheritance. Hence, immediately after the death of the minor son Bibhudindra, the estate vested in Banamali, the nearest reversioner before the adoption took place.

Point for decision : —Is an adoption by a widow valid when the estate vested in a person (Banamali) other than the adopting widow at the time of adoption.

Decision : *Vide p. 69 of this book.*

[N.B. In this connection read *Bhimabai v. Gurunatha-gouda* and *Bhooban Mayee v. Ram Kishore*, below.]

Annie Besant v. Narayaniah, 41 I.A. 314.

Fact : —Narayaniah, a Hindu of Madras and a widower had two sons Krishnamurthi (14 years) and Nityananda (11 years). Mrs. Annie Besant, finding that Narayaniah could not afford to give them upbringing and education for which they were fitted, offered to take entire charge of the boys and to defray the expenses of their maintenance and education which Narayaniah accepted. Mrs. Annie Besant thereupon took over custody of the boys. Thereafter Narayaniah cancelled the aforesaid agreement and demanded custody of his boys which being refused by Mrs. Annie Besant, he brought the suit.

Point for decision : —Whether under the circumstances mentioned above, the father could get back the custody of his boys.

Decision : —(i) The father is the natural guardian of his children during their minority ; but this guardianship is in the nature of sacred trust and he cannot, therefore, during his life time substitute another person to be guardian in his place. (ii) The father may entrust the custody and education of his children to another. (iii) This authority given by the father is revocable authority. (iv) But if the Court, exercising the jurisdiction of the Crown over infants,

is of opinion that it is undesirable in the interest of the children to disturb or disappoint the associations or expectations on the part of the infants, the Court will interfere to prevent the revocation of the authority given by the father.

The P. C. refused the revocation of the authority on the facts of the case and dismissed the suit.

Arumilli Perrazu v. Arumilli Subbarayadu, 48 I.A. 280.

Fact : —The manager (*Karta*) of a joint family instituted proceedings against other members of the family for accounts against those who were in possession of some joint properties. They also similarly claimed for accounts against the manager. The question of share of an adopted son with the subsequently born natural sons on partition, was also in dispute. The parties were *Sudra* by caste.

Points for decision : —(i) How the accounting is to be made between the manager and the other members of a joint family ; (ii) how far the manager is liable as a trustee ; (iii) what share of property an adopted son is to get on partition in relation to subsequently born natural sons.

Decision : —(i) A manager of a joint family, in the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to his personal use, is liable to account only for what he had actually received and not for what he ought to or might have received, if the moneys had been profitably dealt with. (ii) The fiduciary relationship of a manager with the other members of the family does not involve all the duties imposed upon trustees in England. (iii) Among the *Sudras* in Madras, the adopted son shares equally with the subsequently born natural (*Aurasa*) son. (iv) Dattaka-Chandrika is an accepted authority on the law of adoption in Southern India and in Bengal.

Atmaram Abhimanji v. Bajirao, 62 I.A. 139.

Fact : —Manikrao was the deceased owner and the plaintiffs claim the estate as agnates though they are beyond 14 degrees from the deceased owner in preference to the

defendant Atmaram who, being the owner's father's sister's son, is a *Bandhu*.

Point for decision :—Is a person beyond 14 degrees from the *propositus* comes within the category of heirs known as *Samanodakas*.

Decision :—(i) According to Mitakshara school the *Samanodakas* include those agnates whose relationship to the deceased extends from 8th to the 14th degrees from the common ancestor and in the absence of such agnates it devolves upon his *Bandhus*. (ii) In the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted.

Balwant Rao v. Baji Rao, 47 I.A. 213.

Fact :—Bapuji, a Brahmin whose ancestors lived in Maharashtra in the Bombay Presidency, died on a pilgrimage, leaving immovable property in the Central Provinces. His daughter, Saraswati succeeded to his estate. She during her lifetime alienated various portions of the property. After her death, her sons brought suits to recover the portions of property alienated by their mother.

• *Points for decision* :—(i) By what school of Hindu law Bapuji was governed. (ii) What interest the daughter had in the inherited property.

Decision :—(i) *Prima facie* any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu law recognised in that province. But the law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it; consequently, where any such family migrates to another province governed by another law, it carries its own law with it. A family, unless renounces the law of the place whence migrated and adopts the law of new place of residence, will be governed by the law of the original place. (ii) In Bombay Presidency a daughter inheriting from her father takes an absolute estate and not

merely a *widow's estate* as in other parts of India. [N.B. Read *Sarada v. Umakanta*, below.]

Benares Bank v. Hari Narain, 59, I.A. 300.

Fact :—Two brothers Jagdish Narain and Raghbir and their respective sons (some of whom were minors) formed a Hindu joint family governed by the Mitakshara law. They borrowed some money from the Benares Bank on the security of joint family property by executing a mortgage deed. After discharging some previous mortgage debts, the balance of the money raised were spent in carrying on a business which was not ancestral.

Point for decision :—Whether the minor members were liable for the sum, other than that spent to pay off previous mortgage debt, applied in a business which was not ancestral.

Decision :—(i) The manager, even if he be the father of a joint family, cannot start a new business whereby he would be imposing on the minor members the risk and liability of a new business.

Bhagwan Singh v. Bhagwan Singh, 26 I.A. 153.

Fact :—One Madho Singh, a Hindu of a twice-born class, a resident within the jurisdiction of Cawnpur, adopted a boy, the natural son of Madho's mother's sister. The reversionary heirs of Madho brought a suit to set aside the adoption and for declaration of their title to the estate.

Point for decision :—Whether the adoption of mother's sister's son is valid.

Decision :—(i) Dattaka Mimansa and Dattaka Chandrika are of high authority on the law of adoption, the former in the Provinces of Mithila and Benares, the latter in Bengal and Southern India. (ii) The adoption of a mother's sister's son by a twice-born class, is wholly void. Such prohibition of adoption of mother's sister's son having been followed for eighty or ninety years, it is incompetent to a Court of justice to treat the question now as an open one.

Bhagwandeen Dooby v. Myna Baee II M.I.A. 487.

Fact : —Rai Deenanath, a wealthy Hindu Banker carrying on business at Benares, Hyderabad and other places died at Benares childless and intestate. He left two widows, Myna Baee and Doola Baee as co-heiresses of his property which were self-acquired. The property was divided by the order of the District Judge and enjoyed separately by the two widows, Doola Baee died leaving a Will by which she bequeathed the inherited property in favour of her father and infant brother. The other widow Myna Baee commenced a suit to recover the half share of the estate possessed separately by her deceased co-widow.

Point for decision : —Who is entitled to the half estate, the co-widow or the legatee of the deceased co-widow (supposing there was division of the estate or there was no division).

Decision : —(i) The estate which two widows take in their husband's estate, is a joint estate. (ii) The two widows succeeded to the estate as one estate of co-parcenary with a right of survivorship. (iii) The surviving widow is entitled to the other moiety of the estate.

Bhimabai v. Gurunathgouda, 60 I.A. 25.

Fact : —Bhimabai was the widow of Jivangouda who was joint with his brother at the time of his death. Bhimabai had no express authority of her husband to make an adoption ; but she adopted a son without seeking for the consent of her husband's kinsmen.

Point for decision : —Was the adoption by the widow who had no express authority, made under the circumstances of the case, valid.

Decision : —The adoption was not invalid on the ground that it was made by Bhimabai without the consent of the surviving co-parceners.

[N.B. In this connection read *Amarendra v. Sanatan*, above ; and *Bhubun Moyee v. Ram Kishore*, below.]

Bhubun Moyee Debia v. Ram Kishore 10 M.I.A. 279.

Fact : —Gour Kishore Acharj Chowdhury, a Hindu Brahmin gave permission to his wife Chundrabullee Debia, even after the birth of his natural son, a permission in writing for the second time to adopt, the first one being given before the birth of their natural son, Bhowanee Kishore who attained majority and married Bhoobun Moyee and then died without issue. Bhoobun Moyee set up a Will of her husband Bhowanee Kishore whereby she was authorised to adopt a son. Bhoobun Moyee adopted one Rajendra Kishore ; and Chundrabullee about one year thereafter adopted Ram Kishore. Ram Kishore through his guardian brought a suit claiming the entire estate against Bhoobun Moyee personally and as guardian of her adopted son, Rajendra, and Chundrabullee and others.

Point for decision : —Which of the two adoptions is valid.

Decision : —On the death of Gour Kishore, Bhowanee Kishore becomes the full owner and after the death of the latter his widow succeeded as his heir ; and consequently, the adoption by Chundrabullee was void as the power was incapable of execution.

[N.B. In this connection read *Amarendra v. Sanatan* and *Bhimabai v. Gurunathagouda* above.]

Bhupati Nath Smrittitirtha v. Ram Lal 37 C. 128 F.B.

Fact : —Umesh Chandra Lahiri in his Will directed his trustees that they shall spend the surplus income for worship of *Kalee* after the name of his mother i.e., *Iswar Anandamoyee Kalee* which is to be established and consecrated by them.

Point for decision : —Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and make a bequest void.

Decision :—No. The passage of the Dayabhaga, “namely, from his relinquishment in favour of the donee who is a sentient person” to illustrate the proposition that the “right of one may consistently arise from the act of another”, does not apply to the direction given in the testator’s Will that the persons indicated by him shall spend the surplus income in the worship of *Kalee* after establishing the image.

Brij Narain Rai v. Mangla Prasad, 51 I.A. 129.

Fact :—Sita Ram and his sons Mangla Prasad and Jamna Prasad formed a Hindu joint family governed by the Mitakshara law. In 1905 and 1907 Sita Ram mortgaged the joint ancestral property but the purpose for which the money was borrowed was not disclosed in evidence. In 1908 Sita Ram executed the mortgage in suit in order to pay off the earlier mortgages. Mortgagee obtained an *ex parte* decree in 1912 and the present suit was brought by the minor sons, Mangala Prasad and Jamma Prasad, by their mother as guardian with a prayer that the mortgage decree was not binding on the sons.

Point for decision :—Was the decree binding on the sons.

Decision :—*Vide pp. 129 to 132 of this book.*

Buddha Singh v. Laltu Singh, 42 I.A. 208.

Fact :—Saheb Sahai, a minor was the owner of the estate in dispute. He died unmarried leaving behind him his mother, Rani Kishori Kunwar. On her death the rival claimants for succession to the estate were Buddha Singh and Laltu Singh, the former being the grandson of the great-grandfather of Saheb Sahai while the latter is the great-grandson of Saheb Sahai’s grandfather.

Point for decision :—Who is the preferential heir of Saheb Sahai.

Decision :—(i) In Mitakshara, as expounded in the Benares school, the word *Putra* used in connection with

brothers and uncles, must be understood in a generic sense, as in the case of lineal descendants of the deceased, and the descendants in each ascending line, up to the fixed limit, should be exhausted, at any rate, to the third degree before making the ascent to the line next in order of succession. (ii) Hence, the great-grandson of the grand father of a deceased person is entitled to inherit in preference to the grandson of the great-grandfather. (iii) While under the Mitakshara the right of inheritance arises from community of blood, in judging of the nearness of blood-relationship or propinquity among the *Sapindas*, the test to be applied is the capacity to offer funeral oblations.

Chotay Lall v. Chunno Lall 6 I.A. 15.

Fact :—Thakoordas Baboo died at Calcutta without any male issue or widow but an only daughter, Luckhy Bibee who was married to the Defendant. She died and the plaintiffs, the grandsons of a brother of Takoordas claimed the estate which was resisted by the Defendant. Thakoordas was a *Jain* and native of the North-Western Provinces.

Point for decision :—Whether the plaintiffs or the defendant as the husband of Luckhy Bibee became entitled to the property.

Decision :—(i) Hindu law of inheritance is to be applied in the absence of special custom to the contrary. (ii) Under the Mitakshara a daughter's estate inherited from the father is a widow's estate and not *Stridhana*. (iii) Upon her death the father's heir succeed thereto.

Collector of Gorakpur v. Ram Sundar, 61 I.A. 286.

Fact :—Raja Kaushal Kishor Mal died and Indrajit Mal was entitled to succeed to the imparible Raj of Majhauli. But on the death of the Raja, mutation of name of the senior widow was effected without opposition from Indrajit and the Collector was appointed manager by the Court of Wards. Indrajit Mal died leaving his son Balbhadra Narain Mal as

his legal representative. Certain persons, the respondents, got certain properties conveyed to them by sale from Balbhadra. They brought the suit for recovery of the properties from the Collector. The family of the holder of the estate and that of the claimant were joint formerly. 200 years before suit had lived the common ancestor of the deceased holder and of the claimant. For a long period there had been complete separation in worship, food and social intercourse between the claimant's branch of the family and that of the deceased holder. On the death of holder, the claimant did not dispute the widow's taking possession of the estate.

Point for decision :—Whether there was renunciation of the right to succeed so as to terminate the joint status.

Decision :—(i) In order to prove that an ancestral immoveable estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family, to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. This is held in *Shiba Prasad Singh v. Prayag Kumari*, 59 I.A. 331, 345. (ii) A person alleging separation i.e. the defendant, is to prove it, and that separation had been brought about by an intention, express or implied. (iii) The above facts do not substantiate separation. The suit was, however, dismissed for invalid registration of the deed of conveyance.

[N.B. In this connection read *Shiba Prosad Singh v. Prayag Kumari*, 59 I.A. 331, below.]

Collector of Madura v. Mootoo, 12 M.I.A. 397. (1st *Sivaganga* case.)

Fact :—One Ramasamy was adopted by the Raja of Ramnad in Madras Presidency with his chief wife, Mootoo Veroyee Natchear ; and of his seven wives Ranee Kunjara need be mentioned. On the death of his adoptive father, Ramasamy succeeded to the *Zemindary*. He died leaving

behind him, his widow Ranee Parvata Natchear, two infant daughters (who predeceased their mother) and the adoptive mother. The estate ultimately remained in the possession of the widow, Ranee Parvata Natchear. Various litigations between the aforesaid mother-in-law and daughter-in-law, were ultimately compromised and the mother-in-law agreed *inter alia* to the adoption of a son by her daughter-in-law. The latter then adopted her sister's son, Ramalinga. The Government intimated to the Ranee Parvata Natchear that the adoption was invalid and that on her death the estate would escheat to the Crown. Ranee Kunjara brought a suit for declaration that she would succeed to the estate after Ranee Parvata Natchear. Ramalinga brought another suit against the Collector and Ranee Parvata Natchear, for a declaration that the Government's order was illegal and for immediate possession of the estate.

[N.B. Read 2nd *Sivaganga* case, *Katamar Natchear v. Raja*, below.]

Point for decision : —Was the adoption valid.

Decision :—(i) In Madras (*Dravida* country) a widow not having her husband's authority may, with his kinsmen's consent, adopt a son. (ii) Consent of kinsmen depends on the circumstances of each family. In a joint family the consent of the father-in-law, if he be dead, all the husband's brothers should be sought for ; when her husband was separate the consent of the nearest kinsmen is sufficient. (iii) The duty of a Judge administering Hindu law, is not so much to inquire, whether the doctrine is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular school of Hindu law which prevails in the District in which the case arises with which he has to deal and whether such doctrine has been sanctioned by usages ; as by the Hindu system of law clear proof of usage will outweigh the written opinion of text writers.

Dattatraya Sakharam Devli v. Gobind Sambhaji, 40 B.

429.

Fact :—Mahadeb, who was separate in estate from his brother, Sambhaji, died leaving him surviving his wife Parvatibai, a son Ramchandra and 3 daughters. Sometimes after Ramchandra was given away in adoption by Parbatibai. Parvatibai then mortgaged Mahadeb's estate with possession to Dattatraya (plaintiff) many years after her husband's death. Plaintiff having sued for possession was resisted by Sambhaji's sons (Defts. 1 & 2) as Parvatibai had no right to burden the estate by mortgage.

Point for decision :—Did by adoption Ramchandra become divested of the estate vested in him in his natural family before his adoption.

Decision :—By adoption the adopted son loses all the rights he may have acquired to the property of his natural father including the right to property which has become exclusively vested in him before the date of adoption.

[N.B. This view has again been approved in *Bai Keshaba v. Shivasanj*, 56 B. 619 (appeal in 62 I.A. 165, question kept open) disagreeing with *Syama Charan v. Sricharan*, below, and *Rajah Venkata Narasimha v. Sri Rajah*, 29 Mad. 437. In the Central Provinces, Calcutta view distinguished, *Manjubai v. Gulab Rao*, 29 N.L.R. 187, 191. See ante pp. 79-80.]

Debi Prosad Chowdhury v. Golap Bhagat 40 C. 721.F.B.

Fact :—A Hindu widow, in possession of her husband's estate as his heiress, transferred some of the properties by mortgage without proof of either legal necessity or of reasonable enquiry and honest belief by the creditor as to its existence, but with the consent of the next reversioner for the time being.

Point for decision :—Is the transfer binding on the actual reversioner.

Decision :—A transfer of a portion of the husband's

estate, under the circumstances stated above, with the consent of the next reversioner, may arise a presumption that the transaction was for legal necessity or that the mortgagee had acted therein after proper and *bona fide* enquiry and had satisfied himself as to the existence of such necessity ; but this presumption is rebuttable by the actual reversioner by proving that there was no necessity.

Gajadhar Prasad v. Gouri Shankar, 54 A. 698, F.B.

Fact : —One Suraj Prasad died leaving behind him, Kesho and Kali, the claimants to this estate. They are his grandfather's daughter's son's daughter's sons.

Point for decision : —Whether they are heritable Bandhus.

Decision : —They are not heritable Bandhus. Chief Justice held that the enumeration of heritable Bandhus given in the Mitakshara, are exhaustive ; but one of the other two Judges composing the Full Bench did not agree to it ; while the third Judge did not express any view in support of either of the two views. A new mode of finding out the heritable Bandhus has been laid down by Mukerji J.

Gooroo Gobind Shaha v. Anund Lall Ghose, 13 W.R., F.B. 49.

Fact : —Gungadhur's widow, Doyamoyee alienated certain properties belonging to her husband's estate.

Point for decision : —Whether the sons of one Mirtunjoy, the adopted son of the grandson of the great-grandfather of Gungadhar can challenge the alienations made by his widow, Dayamoyee, in the presence of Punchanon, the paternal uncle's daughter's son.

Decision : —(i) Father's brother's daughter's son, Punchanon is a preferential heir according to the Bengal school of Hindu law and hence the suit was not maintainable. (ii) Three classes of *Sapinda* relationship are explained in this case. They are given in pp. 26-30 of this book.

Gopeckrist Gosain v. Gungapersaud, 6 M.I.A. 53.

Fact :—Rogoram Gosain had two sons Gopeckrist and Gungapersaud. He purchased a Taluk in Bengal in the name of Gungapersaud.

Point for decision :—Did or did not the Taluk at the time of the death of Rogoram form part of his estate, so as to pass to both the brothers jointly under a general devise to them contained in the Will, or descended to them as joint heirs in case of intestacy.

Decision :—(i) In a joint Hindu family, the presumption is that the whole property of the family is joint and the burden of proof lies upon the party claiming any part of such property as his separate property, to establish it. (ii) The purchase of any estate by a Hindu in the name of his sons, is to be presumed of its being a *bona fide* purchase, and the burden of proof lies on him in whose name it was purchased to prove that it is his own property. (iii) The person in whose name such a purchase had been made is to be deemed as a trustee for his father and, hence, it formed a part of the father's estate.

Hari Das Chatterji v. Manmatha, I.L.R. (1937) 2 Cal. 265.

Fact :—Shib Krishna Banerjee, a Brahmin adopted Nani Mohan Chatterjee, the daughter's son of his brother Ram Gopal. A distant heir of Ram Gopal brought a suit, few days before the expiry of twelve years from the death of the widow of Ram Gopal when the adopted son died, making the latter's widow a party defendant, for: a declaration that by adoption Nani Mohan lost all his rights in his natural family, that the adoption of a brother's daughter's son is invalid on the principle that the adoption of a son by a person who could not have contracted a legal marriage with the mother of the body during her maidenhood, is invalid, that the adopted son would get maintenance only from the estate of his adoptive father and that the plaintiff

and persons of the same degree are entitled to the estate. The adopted son made various alienations, so the alienees were made parties

Points for decision :—(i) Was the adoption valid, and (ii) if invalid, did the adopted son lose his rights in the family of birth.

Decision :—(i) The adoption of a brother's daughter's son by a regenerate person is invalid, (ii) by an invalid adoption the adopted boy does not lose his rights in the natural family.

Hiralal Singha v. Tripura Charan Roy, 40 C. 650 F.B.

Fact :—One Dayamoyee Dasee and her brother Hira Chand Jalal purchased a house. She after her husband's death became a prostitute, and the house was apparently purchased by her with her own earnings and it was assumed that it was her *Stridhana* property. While in possession of the house, the purchasers leased it to the first defendant. Thereafter, on the death of Dayamoyee, Hira Chand Jalal transferred the house to the plaintiff on the allegation that, upon the death of his father's sister, Dayamoyee, he had taken by inheritance her half share in the property. Plaintiff commenced the present suit for rent. Defence was that Hira Chand could not transfer the entire house as he was not Dayamoyee's heir because she was a prostitute and hence the transferee alone cannot claim the rent.

Point for decision :—Was Hira Chand Dayamoyee's heir.

Decission :—The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connected her to her kindred by blood; and consequently, her *Stridhana* property passes, upon her death, in the absence of nearer heirs, to her brother's son as her heir under Bengal school of Hindu law.

Hunoomanpersaud Pandey v. Babooee Munraj, 6 M.I.A. 393.

Fact : —Raja Sheobuksh died leaving behind him an only son Lal Inderdown, an infant and his widow Ranee Digumbar Koonweree who assumed the proprietorship of the estate of her husband and the guardianship of her infant son. During her guardianship she had to borrow money and to burden the estate, for payment of debts and Government revenue, in various ways. Lal Inderdown on attaining majority brought a suit against the Appallant and the Ranee, for possession of the estate unencumbered, alleging that his guardian mother who managed the estate being a *Purdanasheen* lady was totally ignorant of matters of business, had been imposed on and deceived by her servants and agents. They without her knowledge or authority, made contracts of loan and mortgaged with divers parties and effected incumbrances on the plaintiff's properties. Lal Inderdown having died his infant son Lal Seetla Buksh was substituted being represented by the guardian Mst. Babooee Munraj.

Point for decision : —Whether the defendant could resist the claim to the extent of the mortgage.

Decision : —See pp. 271-272 of this book.

Jatindra Mohan Tagore v. Gnanendra Mohan Tagore,
Read **Tagore v. Tagore** below.

Kameswar Pershad v. Run Bahadur Singh, 8 I.A. 8.

Fact : —Plaintiff-appellant, sued the late Rani to enforce a mortgage against the estate including reversionary interest. The property in dispute by an agreement between the Rani and the reversioners, were in possession of the reversioners. The Rani died after the decree and before the appeal and the second defendant was substituted in her place.

Point for decision : —Can a mortgage decree be passed when the deed was not properly explained to her, nor was it understood by her, nor was she informed that it was a deed mortgaging the property.

Decision : —In order to bind the husband's estate the

mortgagee is bound, at least, to show that she was made to understand the nature of the transaction, that the deed was explained to her and that she intended thereon to transfer her husband's estate. The mortgagee is further to show that he believed on reasonable grounds that the money was wanted for required necessities.

Katama Natchiar v. Rajah Mootoo Vijaya, 9 M.I.A. 539 (Second Sivaganga case, the first one is, *Collector of Madura v. Mootoo*, above).

Fact : —The Zemindary of Shivaganga in Madras was escheated to the Crown which was thereafter granted by the Government to Gowery Vallabha Taver. The parties who then appeared to be entitled to the Zemindary were two brothers, Oya Taver and Gowery Vallabha Taver. Gowery married 7 wives of whom 3 were living at the time of his death. The first, second, third and sixth wives had one or more daughters some of whom bore female or male issues or both and the rest 3 had no issue. Oya Taver died some years after the grant of the Zemindary to his brother Gowery, leaving 3 sons, the eldest of whom after the death of Gowery, took possession of the estate and continued in possession till his death and after his death his son Badha Gooroo Sawmy Taver took possession.

Point for decision : —Who among his widows and their descendants, or the eldest son of Oya Taver, was the heir of Gowery after his death.

Decision : —(i) The estate by the grant became an imitable estate. (ii) The separate acquired estate of a person descends to a widow in default of male issue. (iii) The interest of a Hindu widow is similar to that of a tenant-in-tail of the English law. (iv) The separate acquired property of an undivided member of joint Hindu family, on his death, descends to his heirs. (v) When the daughter inherits such separate estate, she does not acquire any right

of a co-parcenary. (vi) The separated joint family property follows the same course of descent as acquired separate property of a member of an undivided family, but if there is a co-parcenary between the different members of the undivided family, survivorship follows. (vii) Upon the principle of survivorship, the right of the co-parceners in the undivided estate overrides the widow's right of succession, but not to the self-acquired property of a member.

Khunni Lal v. Gobind Krishna, 38 I.A. 87.

Fact : Raja Ratan Singh had a son Daulat Singh and they formed a Hindu joint family. He had a grandson, Raja Khairati Lal by daughter. Raja Ratan Singh abandoned Hinduism and adopted Mahomedan faith. Daulat did not claim by forfeiture the estate, after his father's renunciation of Hinduism, as he was entitled to, under the Hindu law ; but the father and son remained joint until the latter's death. Daulat died leaving his widow and two daughters, Chatter and Mewa. On the death of Raja Ratan a few months later, the name of Ratan's widow, Rani Raj Kunwar was recorded in the Collector's register. Disputes arose between Daulat's heirs on the one side and Rani Raj Kunwar on the other. After the deaths of the widows of Daulat and Ratan, the daughters of Daulat and Raja Khairati, the grandson by daughter of Ratan, entered into the compromise which the plaintiffs, the grandsons by daughter, Mewa, as the reversioners of Daulat, want to set aside.

Points for decision : —(i) Whether the whole estate vested in Daulat by reason of Ratan's renouncing Hinduism. (ii) Is the compromise by Hindu widows, in the absence of legal necessity, binding on the plaintiff.

Decision : —(i) The effect of Bengal Regulation VII of 1832 and Act XXI of 1850 (*lex loci*), is that any law or usage of the Hindus which inflicts forfeiture of rights to property by reason of any person renouncing his or her

religion shall not be enforced. (ii) The compromise on its true construction and having regard to the circumstances, did not amount to an alienation and that the defendants did not derive title from the daughters. The compromise was based on the title of the parties existing antecedent thereto, and acknowledged and defined thereby.

Kulada Proshad Pandey v. Haripada Chatterjee, 40 C. 407.

Fact : —Father of Amrita Lal Pandey original resident of Oudh migrated to Bengal and continued to live with his family in Bankura in Bengal and acquired property there which passed after his death to his son. Amrita had 8 sons two of whom died during his life time leaving behind them their widows, the 8th and 9th defendants. Three other sons, plaintiffs (1 & 2) and defendant (5), embraced Christian faith. Amrita Lal, after the death of his two sons and after the plaintiffs (1 & 2) embraced Christianity, transferred the disputed property to the defendants, (1 to 4) in which his 3 sons (defendants, 5, 6 & 7), joined. After his death the suit was brought by the 3 sons of Amrita, who did not join their father in the transfer in question, for declaration that the transfer with respect to the share of the property was not binding against them and for recovery of possession of the same with mesne profits, on the ground that the transfer had been effected for the satisfaction of illegal and immoral debts of their father.

Point for decision: —Are the plaintiffs entitled to a decree.

Decision: —(i) A Hindu family migrating from Oudh to Bengal carried with it the laws and customs as to succession and family relation prevailing in Oudh, and in the absence of proof that it has adopted the laws and usages of Bengal, must be presumed to be governed by the Mitakshara. (ii) Upon the conversion to Christianity of one member of a joint Mitakshara family, the convert retains such

interest as he had in the family property at the date of his conversion, and the family, so far as he is concerned, ceases to be a joint family and to be governed by the rule of survivorship. (iii) The legal effect of such conversion is not complete severance of entire family, though there may be no presumption that the other members remain united. (iv) Re-union after severance, if alleged, must be proved. (v) Mortgage debts not immoral, incurred by a Hindu father before severance of a son from a joint family, are binding on the son and the son cannot recover his share of the property.

The plaintiffs (1 & 2) were, therefore, given a decree, but not to the plaintiff (3) as he remained Hindu, and, therefore, he was joint at the date of transfer which is binding on him.

Lallubhai Bapubhai v. Mankuvarbai, 2 B. 388.

Fact :—Mulji Nandlal died leaving behind him his widow Sarasvatibai and his daughter Jathibai (alias Bin Jethi) and considerable movable and immovable property mostly in the island of Bombay. He appointed Gangadas (his first cousin) and Trikamlal (his sister's son) as his executors. The executors proved the Will and entered into possession of the estate. Jathibai died without issue leaving her husband. Then Trikamlal died and Gangadas as the surviving executor managed the estate and died leaving a Will by which he appointed his widow, Mankuvarbai as his executrix, who took possession of his estate as well as that of Mulji Nandlal. Then Sarasvatibai died, whereupon Lallubhai Bapubhai and Kasidas, a brother's son of Lallubhai, (the brother being alive at the date of the death of Sarasvatibai) distant collaterals of Lallubhai being within 6 degrees from Mulji, claimed the estate against Mankuvarbai in possession of residue of Mulji's estate which was left undisposed of in his Will, as the heirs of Mulji. She set up that she was the heiress and further she had adopted Jaikisandas as an adopted son to her husband and he is entitled to the residuary estate of Mulji.

Points for decision :—The main points: (i) Whether according to Hindu law the term *Gotraja* includes females; (ii) if so, whether the widow of a *Gotraja-sapinda* is herself a *Gotraja-sapinda* and can be a deceased owner's heiress.

Decision :—(i) In the Presidency and Island of Bombay the wife becomes by her marriage a *Gotraja-sapinda* of her husband, and in that capacity succeeds as a widow to the property of a deceased separated *Gotraja-sapinda* which her husband would have taken as a *Sapinda* before the male representative of a remoter branch. Mankuvarbai, therefore, was a nearer heir than the plaintiff in Bombay school.

Madan Mohana v. Purushottama, 45 I.A. 156. (2nd Chinnakumidi case, 1st being Sri Virda v. Sri Brojo and 3rd being Ananga v. Kunja).

Fact :—A holder of an impartible estate and a member of a joint family, authorised his wife to adopt a son to him. On the death of the holder his brother took possession. The widow of the holder then adopted a son who entered into the possession of the estate, but he died leaving a childless widow. A descendant of the brother of the holder thereupon entered into possession and on his death was succeeded by his son. Thereafter the original holder's widow again adopted a second adopted son, the appellant who brought the suit to recover the estate.

Point for decision :—Was the second adoption valid?

Decision :—The widow's power to adopt came to an end on the first adopted son dying leaving a widow. [In this connection read: *Amrendra v. Sanatan*; *Bhimabai v. Gurunathugouda*, above and *Manikya Mala v. Nanda*, below.]

Manikya Mala Bose v. Nanda Kumar Bose, 33 Cal. 1306.

Fact :—Chandra Kumar Bose, brother of Nanda Kumar Bose died leaving his widow Manikya Mala and an adopted son, Akshoy Kumar Bose. Before his death he authorised

his widow to adopt 3 sons successively. Akshoy Kumar Bose attained his majority, married and died leaving a childless widow, Bidhu Mukhi; and Bidhu Mukhi died thereafter. Shortly after her death, Manikya Mala adopted Mohendra Chandra. Nanda Kumar brought the suit against Manikya Mala (Defendant 1), and Mahendra Chandra her adopted son (Defendant 2) for declaration that the adoption was invalid.

Point for decision :—Was the adoption valid?

Decision :—Power of adoption given to a widow to adopt in succession, in the event of previously adopted son dying without male issue, comes to an end when the first adopted son dies leaving his widow. (ii) The power does not revive in the mother even if she succeeds to the estate on the death of the widow of the first adopted son.

[N. B. Read *Amarendra v. Sanatan*, above.]

Moniram Kolita v. Kerry Kolita 7, I.A. 115. (Unchastity case).

Fact :—Ghinbora and Atma of Assam were two brothers governed by the Bengal school of Hindu law. Atma's son was the Plaintiff-appellant and Ghinbora's son's widow was the Defendant-respondent. After the death of her husband, she began to live with a man as her paramour and had a child by him. The suit was instituted to recover the lands from the Defendant but the plaint did not charge unchastity. The question was referred to a Full Bench consisting of 10 judges, 7 of whom were of opinion that a sonless widow who had once inherited the estate of her husband was not liable to forfeit it by reason of unchastity, while the other 3 including Dwarkanath Mitter J. held a contrary view.

Point for decision :—(i) Whether, under the Hindu law of the Bengal school, a widow forfeits her right to the inherited estate of her deceased husband by reason of unchastity after her husband's death. (ii) Whether the forfeiture, if any, is barred by Act XXI of 1850 (*lex loci* Act).

Decision :—On appeal against the decision of the Full

Bench, the Privy Council held that a widow who has once inherited the estate of a deceased husband, is not liable to forfeit that estate by reason of unchastity. There was no necessity of deciding the other question.

Monohar Mukherji v. Bhupendra Mukherji, 60 C. 452 F.B.

Fact :—The testator, Jagamohan by his Will created an endowment for meeting the expenses of the worship of deities established by him and other religious purposes indicated by him. As regards the office of the *Sebayet* he directed that his eldest son should be the *Sebayet* and after his death his other sons in the order named, and after the death of all his sons, the eldest male member of the family among the sons, son's son and so on from generation to generation in the male line. Monohar Mukerji, the eldest male member who was not born during the lifetime of the testator was the defendant. The suit was to obtain a decision as to the person entitled to be *Sebayet* of the family deities.

Point for decision :—(i) Whether the founder of a Hindu endowment is competent to lay down rules to govern the succession to the office of *Sebayet*. (ii) Whether a person succeeding to the office under such rules, is a grantee or donee and whether his right to succeed is subject to the rule, that a gift cannot be made to one, not in existence at the time of the gift. (iii) Whether the rules of succession to the office is rendered invalid by reason that they provide that it be held by some one among the heirs of the founder to the exclusion of others in an order of succession differing from that of the Hindu law of inheritance.

Decision :—(i) A founder of a Hindu endowment for religious purposes cannot create an order of succession to the office of the *Sebayet* in a mode unknown or repugnant to Hindu law. (ii) A person succeeding to the office is a grantee or donee of property and his right to succeed is governed by the rule that a gift cannot be made by a Hindu

to a person not in existence at the time of the gift. (iii) Rules of succession to the office is rendered invalid by reason that they provide for the office to be held by some among the heirs of the founder to the exclusion of others.

Muddun Thakoor v. Kantoo Lal, 1 I.A. 321.

Fact :—Kantoo Lal and Mahabeer Pershad were the grandsons of Moonshee Kunhya Lal. The suit was brought by Kantoo Lal and Mahabir Pershad (minor represented by his mother) against a number of different defendants, who are wholly unconnected with each other, to set aside the sale deeds executed by the fathers of the plaintiffs and to recover possession of the whole property and not the particular interests of the sons. The plaintiff Mahabir Pershad was born after his father had executed the sale deed to one of the defendants. The defendant, Muddun Thakoor is a purchaser in a sale in execution of a decree obtained by a creditor against the two fathers of the plaintiffs.

Points for decision :—(i) Can a son question an alienation by his father before he was born. (ii) Is the defendant to enquire beyond the decree as to the necessity of the loans contracted by the two fathers?

Decision :—It is a pious duty of the son to pay father's debts, and the ancestral property in which the son acquires an interest by birth is liable for the father's debts unless they have been contracted for immoral purposes. (ii) If a small portion of the property transferred to discharge his debts be not accounted for it will not invalidate the sale. (iii) Under the Mithila law a son is not entitled to any interest in the ancestral property sold by his father before his birth. (iv) A *bona fide* purchaser in a sale in execution of a decree who has paid purchase-money, is not liable to have the property taken from him on the ground that the decree proceeded upon an erroneous view of the law.

Nagindas Bhagwandas v. Bachoo Harikissondas 43 I.A.
56.

Fact:—Two brothers, Bhagwandas and Hurkissandas were the sons of Nagardas. Hurkissandas died and a posthumous son, Bachoo was born to him. Bhagwandas died a day before the said posthumous son was born and a few months after his widow adopted Nagindas. Nagindas brought the suit for partition against Bachoo claiming equal share with him.

Point for decision :—Whether the adopted son of one brother entitled to a half share with the natural son of another brother?

Decision :—The plaintiff is entitled to an equal share with the defendant. The adopted son gets a lesser share when the partition is between an adopted son and a subsequently born natural son; and except this limitation, the adopted son stands in the same position as if he were a naturally-born son of his father.

Narayan Chandra Dutta v. Bhubanmohini, 38 C.W.N. 15.

Fact :—Narendra made an endowment by which he dedicated some property to the worship of some *Siva* images. According to his first deed he was to be the first *Sebayet* and then his wife and thereafter his heirs were to become *Sebayets* in succession. Accordingly, Narendra became the *Sebayet*. Thereafter his wife having died, Narendra executed another deed by which he cancelled the previous arrangement about the *Sebayets* and appointed the defendant, Narayan and his sons etc. according to the rule of primogeniture to be the succeeding *Sebayets*. Narendra died leaving an only daughter Bhubanmohini who brought the present suit alleging that as the sole heiress of deceased Narendra, she was the lawful *Sebayet* and the second deed was not valid.

Point for decision :—Is the second deed whereby the founder of an endowment, after giving effect to a first deed

of endowment with a particular order of succession as to the office of *Sebayets*, changed the previous arrangement, valid.

Decision :—No, he cannot, unless that power was expressly so reserved.

Omrit Koomaree Dabee v. Luckhee Narain Chakrabutty, 10 W.R.F.B. 76.

Fact :—The plaintiff, Nundlal (now represented by his widow) sued for the property of one Raghoonath, his maternal uncle, as the latter's heir. Raghoonath had a daughter, Koochlimonee on whose death one Suroop obtained possession of Raghunath's property. Nundlal sued Suroop for possession and got a decree and possession, but was dispossessed by one Luchme Narain, a decree-holder who got the property in a sale in execution as the property of his judgement-debtor, Suroop. Defendant, Suroop denied plaintiff's possession and dispossession and alleged Luchme's decree as collusive, and as the ancestor of Suroop came from Mithila, the plaintiff being sister's son is not an heir under the Mithila law.

Point for decision :—Whether under the Mitakshara sister's son is a heritable *Bandhu*.

Decision :—In the absence of nearer relation, a man may be heir to his mother's brother as regards property subject to the Mitakshara. The parties were found to be governed by the Mitakshara law.

Peary Mohan Mukherjee v. Monohar, 48 I.A. 258.

Fact :—Raja Peary Mohan was the *Sebayet* of certain deities. In a certain litigation between the sons of the last *Sebayet* and Raja Peary Mohan, certain sum was decreed in favour of the sons of the last *Sebayet* to be paid out of the endowed estate. The property in dispute, a part of the endowment, was sold and purchased by the Raja's son. Monohar Mukerji brought the proceeding asking for the

removal of the Raja from the office of *Sebayet* and for setting aside the purchase.

Point for decision : —Whether the *Sebayet* is to be removed and the purchase of the property by the Raja's son is to be set aside.

Decision : —The grounds for removing a *Sebayet* from his office is not identical with those of trustees in England. The close intermingling of duties and personal interest of *Sebayet* may well prevent the closeness of the analogy, but as part of the office it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the court thinks the obligation of his office can no longer be faithfully discharged, that is sufficient ground for his removal. Raja was removed from the office and the purchase was held invalid.

Pradyumna v. Pramatha on appeal, **Pramatha Nath Mullick v. Pradyumna** 32 I.A. 245.

Fact : —Mutty Lal Mullick consecrated three deities in his family dwelling house. His successor in office Jadulal re-built the dwelling house and erected a temple on the land adjoining to the dwelling house. In his deed of trust he directed that the images were not to be removed unless another suitable temple of equal value were provided. On Jadulal's death disputes among his 3 sons were settled and provisions for the worship of the deities were made. Dispute again arose and the appellant, Piamatha wanted to remove the deities during his turn of worship to his private residence which was opposed by Pradyumna.

Point for decision : —Whether the deities can be removed from the temple to the appellant's dwelling house during his turn of worship.

Decision : —(i) A Hindu deity is a juristic person and can sue and be sued through its manager as that of an infant

heir. (ii) The *Sebayet* is responsible for the religious rites either by personal performance or, as in the case of *Sudras*, by the employment of Brahmin priest. (iii) Family images are not mere movable chattels and their destruction, degradation or injury are not within the power of the founder or other custodian for the time being. (iv) If in the course of management of the worship of the deity by the *Sebayet*, it be thought that the family deity should change its location, the will of the deity is to be given effect to acting through its *Sebayet*. (v) In a contest between co-*Sebayets*, the deity should be represented in the suit by a disinterested next friend appointed by the Court, and the female members interested in the worship should also be joined as parties in the suit.

The case was sent back for trial in the presence of the parties indicated.

Rajani Nath Das v. Nitai Chandra, 48 C. 643 F.B.

Fact :—Rupa Dasi who had a son, Rajani Nath (defendant, 1) by her deceased husband, began to live with Punchanan as his mistress for many years and as a result whereof an illegitimate son, Harimohan (defendant, 2) was born. Punchanan was an agriculturist and died leaving a holding. The plaintiff, the landlord sued to recover its possession on the ground that Punchanan left no legal heir. Punchanon was a *Sudra* by caste.

Point for decision :—Whether under the Bengal school of Hindu law the illegitimate son of a *Sudra* by a continuous and exclusive concubine, is an heir to his putative father.

Decision :—An illegitimate son of a *Sudra* under the Bengal school, is entitled as *Dasi-putra* to a share of inheritance, provided his mother was in the continuous and exclusive keeping of his father and he was not the fruit of an adulterous or incestuous intercourse. This right is not subject either to the condition that his mother was not a slave woman in the technical sense of the term or to the condi-

tion that a marriage could have taken place between his father and his mother.

Ramchandra Martand Waikar v. Vinayak, 41 I.A. 290.

Fact :—Lakshman Rao died leaving his widow, Janki Bai and a daughter Chitka Bai whose husband was Venkatash (defendant. 1). On Lakshman's death his widow Janki inherited the property and on her death his daughter, Chitka Bai succeeded to the estate. After her death her husband adopted defendant 2. The plaintiffs are the paternal grandfather's son's son's daughter's daughter's sons of the *propositus* and they claim the estate as *Bandhus* of Lakshman.

Point for decision :—Are the claimants heritable *Bandhus* of Lakshman.

Decision :—(i) *Sapinda* relationship, according to the Mitakshara, is based not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of women also on marriage with descendants from a common ancestor, this relationship ceasing not merely for purposes of marriage but generally and therefore for purposes of inheritance also—after the seventh degree from the *propositus* on the father's side and fifth on the mother's side. [N.B. Whether funeral oblations can be applied in Mitakshara school read: *Budda Singh v. Laltu Singh*, Decision (iii), above.] (ii) The word *Bandhu* in Mitakshara signify *Bhinna-gotra-sapinda*. (iii) In order that a *Bandhu* may succeed to the inheritance he must not only be within the fifth degree but he and the *propositus* must be *Sapinda* of each other. (iv) The enumeration of *Bandhus* as given in the Mitakshara is held, in *Gridari Lall v. The Bengal Government*, 12 M.I.A. 448 to be merely illustrative and not exhaustive, and hardly warrents the conclusion that the classes specified in Mitakshara, namely, *Atma-bandhus*, *Pitri-bandhus*, and *Matri-bandhus* can be added to. (v) Hindu law contains its own principles of exposition and

questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend on its own principles.

The plaintiffs are not heritable *Bandhus* and the suit was dismissed.

Rangasami Gounden v. Nachiappa, 46 I.A. 72.

Fact :—The suit was brought by the plaintiff as one of the reversionary heirs entitled to one-half of the property last held by Marakammal, the widow of Arthanari Gounden, who had succeeded thereto upon the death of her childless son. She executed a deed of gift of the entire property in suit in favour of the then nearest reversioner. The said donee predeceased the donor and that on the lady's death, the plaintiff and the first defendant were the nearest reversioners and hence, they alleged that they are entitled to the whole estate in equal shares. The claim was resisted on the ground, (a) that the deed was valid and (b) that even if it did not, the plaintiff had either ratified the deed by reason of his taking the conveyances of portions of the property from the donee or estopped from saying that the deed was bad.

Point for decision :—Whether the deed was bad and the plaintiff is entitled to a decree?

Decision :—(i) There is distinction between the power of a widow to surrender her *widow's estate* and her power to alienate it for necessity. (ii) A widow can surrender her whole interest in whole estate in favour of the nearest reversioner or reversioners at the time, but the surrender must be *bona fide*, not a device to divide the estate with the reversioner. In these circumstances question of necessity does not arise. (iii) When an alienation of a part or whole estate is to be supported on the ground of necessity, the consent of such reversioners as might fairly be expected to dispute the transaction, will be held to afford a presumptive proof that the transaction was a proper one. [N.B. Read, *Debi*

Prosad v. Golap Bhakat, above | (iv) A reversioner who takes a mortgage from the transferee of part of the property alienated, is not thereby precluded from contesting the validity of the alienation after the widow's death.

Sahu Ram Chandra v. Bhup Singh, 44 I.A. 126.

Fact :—Bhup Sing and five other persons who were his sons and grandsons formed a Hindu joint family governed by the Mitakshara law. Bhup Sing borrowed money in 1883 from Bhagirath by executing a mortgage of joint property to meet his necessity. In 1884 he again mortgaged the same property with other joint property to the father of the appellants. In 1893, the appellants, their father being dead, sued to enforce the mortgage of 1884 and a decree was made conditional upon their discharging the prior mortgage of 1883. They paid the money to Bhagirath and got the bond of 1883. The appellants executed their decree against the property under mortgage of 1884 and themselves purchased it. In 1910 the appellants instituted the present suit upon the bond of 1883 against the respondents, namely, Bhup Singh, his sons and grandsons including some other transferees of Bhup Sing of some of the mortgaged properties. The defendant *inter alia* pleaded that the money was not borrowed for family necessity.

Point for decision :—Whether the mortgage was enforceable.

Decision :—(i) The father of a joint family governed by the Mitakshara, can sell or mortgage the joint family property so as to bind his sons in two cases, namely, (1) Where the alienation is for family necessity; (2) Where the alienation is made to discharge a debt which (a) was antecedent to the alienation, (b) was incurred wholly apart from the security of the joint family property, and (c) is not proved to have been incurred for immoral purposes. (ii) During the father's life an alienation by him is effective only in the first case, since its validity in the case rests upon the pious duty

of the sons to discharge their father's debt and that duty arises only upon his death. [N.B. The view of law was completely modified by Privy Council itself in *Brij Narain v. Mungla Prosad*, above].

Sarada Prasanna Roy v. Umakanta, 50 Cal. 370.

Fact :—Tara Prassana Roy, brother of the appellant, made a Will of his properties in favour of his wife Trilokmohini Debi and died. Trilokmohini before her death transferred 3 of the properties to Monomohan Pande, who again sold some of these properties to Umakanta Hazari and another. The appellant resisted the transferees from taking possession and, hence, brought this suit. The defence *inter alia* was that the ancestors of the appellant and Tara Prasanna migrated into Bengal from the North-West Provinces some generations ago, and he and his brother should be governed by the Mitakshara law and hence, Tara Prasanna could not make a Will. His ancestors were found to have adopted the Dayabhaga law.

Point for decision :—Whether Tara Prosanna was governed by the Dayabhaga or the Mitakshara law.

Decision :—Where a Hindu family migrates from one province to another, the presumption is that it carries with it the laws and customs as to succession and family relations prevailing in the province from which it came ; but this presumption may be rebutted by proof that the family has adopted the law and usages of the place to which it has migrated ; the reason being that Hindu law is not merely a local law but is essentially a personal law, an integral factor of the status of every family. (ii) The acceptance of the new law may not be due to sudden change by choice or agreement but it may be by gradual evolution of family usage, consciously or unconsciously. (iii) But having accepted the new law, the family is not permitted to revert back to the law of its original domicile, unless the newly adopted law is changed by legislation or that it had been discontinued in

the family for sometime. [Read *Abraham v. Abraham* above.]

Shiba Prasad Singh v. Prayag Kumari, 59 I.A. 331 (*Jharia* case.)

Fact :—Raja Durga Prosad Singh, the holder of the imparible Jharia Raj, died childless, survived by three widows who were the plaintiffs in the suit and respondents in one of the appeals. The defendant Shiba Prasad was a collateral relative of the deceased Raja. The parties were governed by the Mitakshara law. The deceased Raja left behind him the imparible estate, Jharia, as also considerable other immovable property and cash, jewellery and other movable property. Upon the death of the Raja, the defendant, Shiba Prasad took possession of the estate including all other properties claiming them by survivorship. The plaintiff set up disruption of joint family and claimed the estate.

Point for decision :—The question involved was as to the right of succession to the estate and other property, movable and immovable left by the Raja.

Decision :—(i) The right of survivorship is not inconsistent with the custom of imparibility and it applies to the devolution of such estate in a Mitakshara joint family. (ii) In order to establish that a family has ceased to be joint it is necessary to prove an intention, express or implied, on the part of the junior members to renounce their right of succession ; it is not sufficient to show a separation in food and worship merely. [N.B. Read: *Collector of Gorakpur v. Ram* above.] (ii) Unless the power is excluded by statute or custom, the holder of a customary imparible estate, by a declaration of his intention, can incorporate with the estate self-acquired immovable property so as to clothe the latter property with the incidents of imparible estate. It is otherwise in cases of Crown grants subject to the law of primo-

geniture. (iv) Blending the income from self-acquired property with that of an imitable estate raises no intention to incorporate, but it may be indicated by other modes. (v) Movable property cannot be so incorporated with the imitable estate. (vi) Apart from custom movables do not devolve with the Raj.

Syamacharan Chattopadhyaya v. Sricharan, 56 Cal. 1135.

Fact : —The plaintiff and the defendant were the two sons of Gobinda. After the latter's death, his widow gave away in adoption the defendant, Sricharan.

Point for decision : —Will Sricharan be divested of the estate inherited from his natural father after the latter's death, by reason of his adoption into another family.

Decision : —Under the Bengal School an heir who has inherited any property from the family of his birth, is not subsequently divested of it on his being adopted by another person. [N.B. Read contrary view, *Dattatraya v. Govind*, above and the note thereunder.]

Sri Balusu Gurulingaswami v. Sri Balusu, 26 I.A. 113.
[N.B. The appeal from Madras and another from Allahabad heard together.]

Fact : —The widow of Butchi Sarvarayudu, the first respondent adopted the second respondent, Sri Balusu Paitabhiramaya, the only son of a distant deceased relation.

Point for decision : —Was the adoption of an only son valid?

Decision : —(i) The adoption of an only son having taken place in fact is not null and void. (ii) Jaimini's rule to the effect that all precepts supported by the assignment of a reason, are to be taken as recommendation only though strongly commented upon by their Lordships, has been, in effect, adopted. (iii) In the absence of authority, the widow governed by the Madras school, can adopt with the assent of the Sapindas. [N.B. Whose authority needed: *vide Collector of Madura v. Mootoo* above.]

Suraj Bunsi Koer v. Sheo Prosad, 6 I.A. 88.

Fact :—The respondents were the purchasers at a sale in execution of a decree upon a mortgage obtained by Bolaki against Adit Sahai, the deceased husband of the appellant and the father of the infants, of a share of an ancestral village in his (Adit Sahai's) name. The suit was instituted on the substantial allegations, namely, that the said village was ancestral property in which Adit Sahai's minor sons were jointly interested, that the estate could not be sold for Adit's personal debts contracted under no legal necessity, but for mere purposes of extravagance, and that the purchasers bought it with full knowledge of the objection made at the time of execution. It was, therefore, prayed that the purchaser be restrained from taking possession. The defence of the purchaser was that the money raised was needed for legitimate purposes and that the minors were not born when Adit incurred the debts, to discharge which that mortgage was executed. At the execution proceeding the minor sons objected to the execution but were referred to a suit.

Point for decision :—What was the interest that passed to the purchasers.

Decision :—(i) Father's debts were for justifying necessity. (ii) That as between the infants and the execution creditor, neither they nor the ancestral immovable property in their hands are liable for the father's debt. (iii) The purchasers having purchased the property after the objection of the sons of Adit, he must be taken to have notice, actual or constructive, of plaintiff's claim, and, therefore, their purchase is subject to the result of the suit to which they have been referred. (iv) As regards the judgment debtor's undivided share in the property, the effect of the execution sale was to transfer the said share to the purchasers, the execution proceedings having at the time of the judgment-debtor's death gone so far as to constitute in favour of the execution

creditor, a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale.

Tagore v. Tagore, Jatindra Mohan Tagore v. Ganendra,
I.A. 47 (Sup. Vol.)

Fact :—Prasanna Kumar Tagore a Hindu resident of Calcutta, governed by the Dayabhaga school, died leaving valuable properties both ancestral and self-acquired. Ganendra was his only son who embraced Christian faith in the life-time of his father. His father gave him some property which yielded an annual income of Rs. 7000. Prasanna Kumar in his Will bequeathed his property to four persons including Jatindra Mohon. The testator then devised his property thus: (1) Unto and to the use of Jatindra Mohan for the term of his natural life and after the termination of that estate; (2) to the use of the eldest son of Jatindra Mohan born during the testator's life for the life of such eldest son and after the termination of that estate; (3) to the use of the first and other sons successively of the eldest son of Jatindra Mohan in accordance to their respective seniorities as in tail male; (4) to the use of the second and other sons of Jatindra Mohan born during the testator's life successively in tail male; (5) to the use of the first and other sons of Jatindra Mohan born after the testator's death in tail male; (6) after the failure or termination of the use and states hereinbefore limited, to Sourindra Mohon for life, and (7) similar limitations for Sourindra's sons, grandsons etc. in tail male.

Point for decision.—Whether the Will is valid. What are the respective rights of the legatees under the Will.

Decision :—(i) The distinction between heritable freeholds and personality is not known in Hindu law. (ii) Heirs according to Hindu law are those who are most capable of exercising religious rights beneficial to the testators. (iii) A gift *inter vivos* or by a Will cannot prevail against the law of inheritance. (iv) All states of inheritance created by gift

or Will, so far as they are inconsistent with Hindu law of inheritance, are void as such and no person can succeed thereunder. (v) A person capable of taking under a Will must be such a person as can take a gift *inter vivos* and, therefore, must either in fact or in contemplation of law, be in existence at the death of testator. (vi) Trusts are recognised in India.

It was held that Jatindra was beneficially entitled to the life-interest under the Will and that upon the failure or termination of such interest, the beneficial interest in the estate vested in the plaintiff Ganendra.

Wooma Deyi v. Gokoolanund, 5 I.A. 40.

Fact :—The appellant Wooma Deyi was a childless widow in indigent circumstances. Her sister had a husband and children living, but was provided for by her marriage. Their father adopted Gokoolanund, a distant relation, though he had a nephew whom, it was alleged, he was bound to adopt in preference to Gokoolanund. The suit was brought by appellant for setting aside the adoption and claimed the estate in preference to her sister.

Point for decision :—Is the adoption valid and is the appellant the preferential heir.

Decision :—(i) Orissa is governed by the Benares school. (ii) In this school, failing a maiden daughter, the succession to a deceased father's estate devolves on an indigent married daughter, and her right is not lost by reason of her becoming a childless widow. (iii) Adoption of a distant relation in preference to brother's son is valid. (iv) The texts which prescribe the preferential adoption of such sons have not the force of law.

ABBREVIATIONS

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A.	Allahabad (Indian Law Reports).
(1922) A.	All India Reporter, Allahabad, 1922.
A. C.	Law Reports, Appeal Cases.
A. L. J.	...	...	Allahabad Law Journal.
B.	...	...	Bombay (Indian Law Reports).
(1922) B.	...	...	All India Reporter, Bombay, 1922.
B. H. C. or B. H. C. R.	...	...	Bombay High Court Reports.
B. L. R.	...	...	Bengal Law Reports.
Bom. L. R.	...	...	Bombay Law Reporter.
Bur. L. T.	...	...	Burma Law Times.
C.	...	...	Calcutta (India Law Reports).
(1922) C.	...	...	All India Reporter, Calcutta, 1922.
C. or Ch.	...	...	Chapter.
Ch. D.	...	...	Chancery Division.
C. L. J.	...	...	Calcutta Law Journal.
C. L. R.	...	...	Calcutta Law Reports.
C. W. N.	...	...	Calcutta Weekly Notes.
D. B. or Daya,	...	...	Dayabhaga.
D. T.	...	...	Daya-Tattva.
F. B.	...	...	Full Bench.
H. L.	...	...	Hindu Law.
H. L. A. C.	...	...	House of Lords Appeal Cases.
H. W. Act.	...	...	Hindu Wills Act.
Hyde	...	...	Hyde's Report.
I. A.	...	...	Law Reports, Indian Appeals.
I. C.	...	...	Indian Cases.
I. C. 102, (A), (B), (C), (L), (M), (N), (Pes). (R) or (S)	...	...	Indian Cases, Allahabad, Bombay, Calcutta, Lahore, Madras, Nag- pur, Peswar, Rangoon or Sindh decision.
I. D. (O. S.)	...	...	Indian Decisions (Old Series).
I. L. R. (1940) A	...	...	Allahabad (Indian Law Reports) 1940.
I. L. R. (1940) B	...	...	Bombay (Indian Law Report) for 1940.
I. L. R. (1940) 1 or 2 C	...	...	Calcutta (Indian Law Report) Vol 1 or 2 for 1940.
I. L. R. (1940) M	...	...	Madras (Indian Law Reports) for 1940.
I. S. Act.	...	...	Indian Succession Act.
L.	...	...	Lahore (Indian Law Reports).

(1922) L.	...	...	All India Reporter, Lahore, 1922.
L. L. J.	...	...	Lahore Law Journal.
L. W.	...	...	Law Weekly (Madras).
Luc.	...	...	Lucknow (Indian Law Reports).
M. or Mad.	...	...	Madras (Indian Law Reports).
1922 M.	...	...	All India Reporter, Madras, 1922.
Mer.	...	...	Merivale Ch. 1815—17.
Mit.	...	...	Mitakshara.
M. H. C. R.	...	...	Madras High Court Reports.
M. I. A.	...	...	Moore's Indian Appeals.
M. L. J. or (1939)	...	...
M. L. J.	...	...	Madras Law Journal.
M. L. T.	...	...	Madras Law Times.
M. W. N.	...	...	Madras Weekly Notes.
Mys. L. J.	...	...	Mysore Law Journal.
1922 N.	...	...	All India Reporter, Nagpur, 1922.
N. or Nag.	...	...	Nagpur.
N. L. J.	...	...	Nagpur Law Journal.
N. L. R.	...	...	Nagpur Law Reports.
1922 O.	...	...	All India Reporter, Oudh, 1922.
O. C.	...	...	Oudh Cases.
O. L. J.	...	...	Oudh Law Journal.
P.	...	...	Patna (Indian Law Reports).
1922 P.	...	...	All India Reporter, Patna, 1922.
Pat.	...	...	Patna (Indian Law Reports).
P. C.	...	...	Privy Council.
1922 P. C.	...	...	All India Reporter, Privy Council.
P. L. R.	...	...	Punjab Law Reports.
P. R.	...	...	Punjab Record.
P. W. R.	...	...	Punjab Weekly Reporter.
Pat. L. J.	...	...	Patna Law Journal.
Pat. L. W.	...	...	Patna Law Weekly.
R.	...	...	Rangoon (India Law Reports).
1922 R.	...	...	All India Reporter, Rangoon, 1922.
S. or Sec.	...	...	Section.
SS. or Sub-Sec.	...	...	Sub-Section.
1922 S.	...	...	All India Reporter, Sindh.
S. L. R.	...	...	Sindh Law Reports.
Sel. Rep.	...	...	Select Reports.
Yaj.	...	...	Yajnavalkya.
Vir.	...	...	Viramitrodaya.
W. R.	...	...	Weekly Reporter.
W. & T.	...	...	White & Tudor's Leading Cases.

